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IN THE
Supreme Court of the United States

JAMES BANNISTER,

Petitioner,

v.

ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari
to the Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the prosecution's presentation of testimony at trial subject to a consistency provision in a plea agreement – that is, a provision binding the witness to testify consistently with prior statements made to the police or prosecutors while not under oath – contravenes the Due Process Clause.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Bannister respectfully petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court.

OPINIONS BELOW

The opinion of the Illinois Supreme Court, Pet. App. 1a–31a, is reported at 923 N.E.2d 244 (Ill. 2009). The opinion of the Illinois Appellate Court, Pet. App. 32a–66a, is reported at 880 N.E.2d 607 (Ill. App. Ct. 2007). The relevant trial court proceedings and order are unpublished.

JURISDICTION

The Illinois Supreme Court denied rehearing for this case on January 25, 2010. Pet. App. 67a. Justice Stevens subsequently extended the time to file this petition to and including June 24, 2010. No. 09A951. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In a typical plea agreement in which an individual agrees to provide testimony in exchange for prosecutorial leniency, the agreement requires the individual to give truthful testimony at trial. This case presents an important and recurring issue concerning testimony offered pursuant to a different type of plea agreement: one that not only requires

that the accomplice shall give truthful testimony, but also requires that such testimony "shall be consistent" with certain prior unsworn statements to the police. Pet. App. 68a. A bare majority of the Illinois Supreme Court held that the Due Process Clause permits the prosecution to present such testimony.

1. On an evening in 1989, in a housing project in Chicago, several men shot at Dan Williams, killing him and a bystander, Thomas Kaufman. Police quickly surmised that the shooting was gang related and concentrated their investigation on suspected members of a local street gang.

A few weeks after the shooting, Cook County police officers interviewed Deanda Wilson, a twelve-year-old member of a rival gang. According to Wilson, the police began the interview by showing him pictures of seven men, including petitioner, whom they suspected of being involved in the shooting. Wilson then told police that he had seen those seven men shooting at the victims.

Another of the individuals depicted in the police photographs was Michael Johnson. The police arrested Johnson and showed him the same seven photographs that they had showed to Wilson. Johnson initially denied any involvement in the incident or any knowledge of who was involved. Pet. App. 7a. After twenty-four hours at the police station, Johnson changed his story. He said that he and the six other men in the photographs had all shot and killed Williams and Kaufman. The police recorded and transcribed Johnson's statement, which is reproduced at Pet. App. 72a–83a.

The State charged Johnson, petitioner, and the five other individuals in the photographs with two counts of first-degree murder. Because Johnson was the only defendant to have implicated himself, the trial court severed his trial from the others.

During Johnson's pretrial proceedings, he executed an affidavit saying that he had mistakenly implicated one of the other codefendants, Eric Smith, as one of the seven individuals involved in the shootings. Later, Johnson testified under oath that he had no recollection of confessing or implicating others. Pet. App. 7a. Johnson was nevertheless convicted of both counts and sentenced to life without parole.

Johnson refused to testify at the trial of petitioner and his five codefendants, thereby precluding the State from introducing any of his statements. The State introduced a variety of other evidence implicating several of the defendants in the shooting, but "the only direct evidence against [petitioner] was the testimony of Deanda Wilson." Pet. App. 2a. Petitioner called four witnesses, each of whom testified that he was at home at the time of the shootings. The jury convicted all six defendants of both counts, and the court sentenced each to life in prison without parole.

2. Petitioner continued to maintain his innocence on appeal and eventually filed a petition for postconviction relief, based on the fact that Wilson had recanted his trial testimony. Pet. App. 3a. The trial judge responded that "this is a difficult situation for me because it's one of the few times in 20 years I ever disagreed with a jury's verdict on a particular defendant. . . .]H]ad it been a bench trial I would

have found Mr. Bannister not guilty, given the identification and his alibi." Pet. App. 47a. Nonetheless, he dismissed the petition without an evidentiary hearing.

The Illinois Appellate Court reversed and ordered the trial court to hold an evidentiary hearing. At the conclusion of that hearing, the trial court determined that Wilson's testimony "was not accurate and truthful" because he did not actually witness the shooting. Pet. App. 3a; *see also* Pet. App. 37a–38a. Because the State had not offered any other evidence at petitioner's trial implicating him in the murders, the court concluded that "the outcome of [petitioner's] trial likely would have been different without Wilson's perjured testimony" and vacated his convictions. Pet. App. 3a.

3. The State elected to retry petitioner. To that end, Cook County prosecutors approached Johnson, who was then in the midst of serving his natural-life sentence. He was housed in a super maximum security prison under twenty-three-hour lockdown.

Six months later, the parties entered into a plea agreement in which Johnson agreed to testify at petitioner's retrial. The agreement, in language typical of plea bargains involving purported accomplices, required Johnson to "testify truthfully in all matters regarding the 1st Degree Murders of Dan Williams and Thomas Kaufman." Pet. App. 68a. The agreement, however, further contained a consistency provision, which required that:

> Such truthful testimony shall be consistent with Michael Johnson's post-arrest statements in December 28, and December

> 29, 1989, to Chicago Police officers and Cook County Assistant State's Attorneys and his statements made to Cook County State's Attorney personnel during his pre-plea agreement interviews on April 29 and May 24, 2004.

Pet. App. 68a. Put another way, this provision prohibited Johnson from testifying in conformity with the affidavit he signed during his prosecution. The agreement also provided that the deal would be "null and void" if, among other things, Johnson's "post-arrest statements and his pre-plea agreement interviews, upon which this agreement was predicated, . . . are found to be false." Pet. App. 70a.

In exchange for Johnson's testimony, the State agreed to vacate one of his murder convictions and to recommend a significant reduction in his sentence for the other. The State also agreed to recommend transferring Johnson to a medium-security facility. Pet. App. 69a–70a.

At petitioner's second trial, the State put Johnson on the stand, and he testified the way he had promised to do in his agreement. Johnson's testimony was the only direct evidence that petitioner was involved in the shooting. The State presented three other eyewitnesses to the shooting, but they all testified that they had seen only *five* people shoot at the victims. None of them recalled seeing petitioner that evening.[1]

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[1] The State presented one other witness who testified that seven men – one of whom was petitioner – had robbed him

In his defense, petitioner again presented four alibi witnesses. As in 1991, each one testified that petitioner was at his mother's house when the shootings occurred. Pet. App. 2a, 7a, 44a.

But to no avail. Sitting as finder of fact in a bench trial, the same trial judge who oversaw petitioner's first trial convicted petitioner of both counts of first-degree murder and sentenced him to life in prison without parole. The State subsequently made good on its promises to Johnson. Pet. App. 21a. With good-time credits, he is scheduled to be released from prison in ten years.

4. Petitioner appealed his conviction, arguing that the State's presentation of Johnson's testimony subject to the consistency provision in his plea agreement violated his right to due process under the Fourteenth Amendment. Pet. App. 48a. Petitioner contended that the provision subverted the truth-seeking function of trial because it interfered with Johnson's oath to testify truthfully.

The Illinois Appellate Court rejected the argument and affirmed. Pet. App. 48a–52a. It did not dispute that the Due Process Clause prohibits the prosecution from presenting testimony that impedes the truth-seeking function of trial. But it reasoned that the consistency provision "did not violate [petitioner's] rights to due process and a fair trial"

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shortly before the shootings. The State, however, never charged petitioner with robbery. And when the prosecution asked the witness to identify the seven men from photographs, the witness wrongly identified a photograph of another one of the original defendants as petitioner.

because the overall plea agreement "neither compelled Johnson to disregard his oath of truthfulness nor bound him to a particular script or result." Pet. App. 52a.

5. A bare majority of the Illinois Supreme Court affirmed. Relying on *State v. Bolden*, 979 S.W.2d 587 (Tenn. 1998), and *People v. Jones*, 600 N.W.2d 652 (Mich. Ct. App. 1999), the majority held that Johnson's testimony pursuant to the consistency provision did not violate due process because other provisions of his plea agreement required Johnson generally to tell the truth and provided that the agreement was void "if any of the representations contained in his prior statements were found to be false." Pet. App. 17a. In the majority's view, these provisions rendered the testimony acceptable because they imposed an "overriding requirement . . . that the accomplice . . . testify truthfully." Pet. App. 17a. Thus, the court concluded, the traditional safeguard of cross-examination was sufficient to allow petitioner to probe Johnson's credibility. Pet. App. 17a–18a.[2]

The dissent disputed the majority's suggestion that the taint of a consistency provision can be erased by a generalized truth-telling obligation in a plea

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[2] The Illinois Supreme Court also held that petitioner lacked standing to challenge the validity of Johnson's plea agreement itself. Pet. App. 8a–10a. Petitioner does not renew that argument here. Instead, he seeks review only of the Illinois Supreme Court's rejection of his argument that the admission of "Johnson's *testimony*" subject to the agreement "denied [him] a fair trial." Pet. App. 10a (emphasis added).

agreement. Agreeing with petitioner's argument that "the State has no crystal ball to know what the 'truth' is – it only knows what statements are consistent," Pet. App. 28a, the dissent maintained that a provision requiring that a witness's in-court testimony "'*shall*' be consistent with certain of his prior statements" violates due process, Pet. App. 30a. This was especially true, the dissent contended, in this case, in which "the witness[] had a history of inconsistent statements." Pet. App. 30a.

6. The Illinois Supreme Court denied rehearing without comment. Pet. App. 67a.

REASONS FOR GRANTING THE WRIT

The Illinois Supreme Court's decision widens an acknowledged division among state courts of last resort and a federal court of appeals over whether the prosecution's presentation of testimony pursuant to a consistency provision in a plea agreement violates the Due Process Clause. This Court should resolve this conflict. The criminal justice system relies heavily upon the use of accomplice-turned-informant testimony, and the use of consistency provisions to contractually bind such witnesses to give particular testimony at trial raises important questions about the integrity of criminal trials.

Furthermore, the Illinois Supreme Court's decision holding that the Constitution allows testimony pursuant to consistency provisions is incorrect. The Due Process Clause prohibits the prosecution from interfering with the truth-seeking function of trial. When the prosecution presents testimony subject to a consistency provision, the prosecution requires the witness to recite a specific

version of events that it has predefined as the "truth." This interferes both with the witness's ability to discharge his oath – the centuries-old mechanism for securing truthful testimony – and the jury's role as ultimate finder of fact.

I. The Decision Below Widens An Irreconcilable Conflict Among State And Federal Courts.

Courts are intractably divided over whether the prosecution violates the Due Process Clause when it presents testimony at trial under a plea agreement requiring that the witness's testimony be consistent with prior statements he made to law enforcement. Courts take three different approaches to the issue: four always allow such testimony; three never allow such testimony; and one takes a fact-intensive approach, but would not have allowed the testimony at issue here.

1. The Illinois Supreme Court's decision allowing the prosecution to introduce accomplice testimony pursuant to consistency provisions comports with decisions of two other state supreme courts and one intermediate appellate state court.

In *State v. Bolden*, 979 S.W.2d 587 (Tenn. 1998), the prosecution presented testimony from an accomplice whose plea agreement required him to testify "truthfully . . . and as he stated in his statement to [law enforcement] on 3/21/94 at 6:05 p.m." *Id.* at 589. The Tennessee Supreme Court held that testimony pursuant to such a consistency provision does not violate due process. *Id.* at 593. The court reasoned that such "testimony [i]s not tainted" because a general truth-telling obligation

alongside a consistency provision makes "the agreement hinge[] upon truthful testimony." *Id.* at 592. Thus, the jury may consider a consistency provision in assessing a witness's credibility, but such a provision does not affect the permissibility of the witness's testimony. *Id.* at 592–93.

The Wisconsin Supreme Court has similarly held that an agreement requiring a purported accomplice "to testify to the state's version of the 'truth,' . . . [is] no different from any other . . . negotiated plea agreement[] with accomplices in exchange for their testimony." *State v. Nerison*, 401 N.W.2d 1, 8 (Wis. 1987). Accordingly, in a case in which the Wisconsin Court of Appeals had held that the prosecution violated due process by presenting testimony from a witness whose plea agreement required him to testify "consistent with his testimony at [an earlier] [h]earing," *State v. Nerison,* 387 N.W.2d 128, 133 (Wis. Ct. App. 1986), the Wisconsin Supreme Court reinstated the defendant's conviction. The court concluded that the normal procedural safeguards used to protect a defendant's right to a fair trial in a case involving a plea agreement – cross-examination, disclosure of the agreement, and jury instructions on accomplice credibility – are always enough to guarantee due process. *Nerison*, 401 N.W.2d at 8.

Lastly, the Michigan Court of Appeals has held that due process allows the prosecution to present testimony subject both to a general truthfulness provision and a consistency provision. *People v. Jones*, 600 N.W.2d 652, 656–57 (Mich. Ct. App. 1999). The court reasoned that although such a consistency

provision provides "some incentive" for a witness "to conform [his] trial testimony to [his] prior accounts," it does not "render[] the witnesses' testimony so tainted as to be inadmissible." *Id.* at 657.[3]

2. One federal court of appeals and two state high courts have adopted precisely the opposite position. The U.S. Court of Appeals for the Armed Forces (formerly the U.S. Court of Military Appeals) has held that due process prohibits the prosecution from presenting an accomplice's testimony subject to a provision that requires the witness to testify consistently with a pretrial statement to law enforcement. *United States v. Stoltz*, 14 C.M.A. 461, 464 (1964). Declaring that a consistency provision "obviously detract[s] from the quest for truth," the

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[3] The Illinois Supreme Court also suggested that its holding is consistent with the Arizona Supreme Court's decision in *State v. Rivera*, 109 P.3d 83 (Ariz. 2005). But *Rivera* did not involve a consistency provision. *Id.* at 87. Instead, the witness's plea agreement simply recited an avowal from the witness that her prior statements were truthful. *Id.* at 84. The Arizona Supreme Court made clear that such an avowal "is not the same as requiring [a witness] to testify consistently with [a] specific version of the facts." *Id.* at 86. What is more, the Arizona Supreme Court expressly *rejected* the holdings of Tennessee and Wisconsin supreme courts that a witness's "obligation to testify truthfully over[comes] any pressure" a consistency provision imposes "to testify consistently with a prior statement." *Id.* at 87; *see also State v. Fisher*, 859 P.2d 179, 184 (Ariz. 1993) (holding that consistency provisions are unenforceable because they "undermine the reliability and fairness of the trial . . . and taint the truth-seeking function of the courts by placing undue pressure on [a] witness[] to stick with one version of the facts regardless of [the truth]").

court "utterly condemn[s]" testimony pursuant to such a provision "as a pollution of the stream of justice." *Id.* at 464–65; *see also United States v. Gilliam*, 23 C.M.A. 4, 8 (1974) (testimony subject to agreement that "required [a witness] to testify in a particular manner" improperly bound the witness "without regard for the sanctity of his oath"). The court allows accomplice testimony subject to a plea agreement only when there is a "complete understanding . . . that [the witness is] to testify *only* truthfully" – a requirement that cannot be met when a plea agreement contains a consistency provision. *Gilliam*, 23 C.M.A. at 8 (emphasis added). In the years following these holdings, there does not seem to be any record of any federal prosecutor – inside or outside of the military – presenting testimony subject to a consistency provision.

The Supreme Court of California has reached the same conclusion, reasoning that when the prosecution provides a purported accomplice with a benefit "subject to the condition that his testimony substantially conform to an earlier statement given to police," then "the accomplice's testimony is 'tainted beyond redemption' and its admission denies the defendant a fair trial." *People v. Allen*, 729 P.2d 115, 130–31 (Cal. 1986) (quotation and citation omitted) (citing *People v. Medina*, 116 Cal. Rptr. 133, 141 (Ct. App. 1974)). In other words, when a bargain is "expressly contingent on the witness sticking to a particular version" of his story, *People v. Garrison*, 765 P.2d 419, 430 (Cal. 1989), "[t]he error involved in the use of such tainted testimony is a denial of the fundamental right to a fair trial in violation of federal

constitutional principles." *Id.* at 428 (alteration in original) (quoting *Medina*, 116 Cal. Rptr. at 146).[4]

The Kansas Supreme Court likewise has held that the prosecution may not present testimony pursuant to a consistency provision. In *State v. Dixon*, 112 P.3d 883 (Kan. 2005), a witness agreed in a probation agreement to "testify . . . in a consistent and truthful manner as set forth in his [sworn] inquisition." *Id.* at 914. Noting the "split in authority as to whether a consistency agreement affects a defendant's right to a fair trial," the Kansas Supreme Court specifically rejected the Michigan Court of Appeals' holding in *Jones*. *Id.* at 915–17. Instead, it ruled that the prosecution may not require anything more of accomplices in plea agreements than they "testify[] completely and truthfully," even when the prior statements at issue were given under oath. *Id.* at 917. Otherwise, the accomplice will feel too much pressure to adhere to his prior statements. *See id.* at 915.

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[4] The Illinois Supreme Court's suggestion that the California Supreme Court has since backed away from these decisions, *see* Pet. App. 12a, is incorrect. While the California Supreme Court has *declined to extend* the "*Medina* rule," it has never cut back on the rule itself. *See People v. Boyer*, 133 P.3d 581, 612–13 (Cal. 2006) (distinguishing plea agreements in which witness represents that prior statements are truthful from those that require consistency and reaffirming impermissibility of testimony subject to the latter); *People v. Jenkins*, 997 P.2d 1044, 1119–20 (Cal. 2000) (allowing accomplice testimony while charges are pending against the accomplice because pending charges are not the same as a consistency provision).

Petitioner would also likely prevail in three additional states whose courts have not directly confronted the issue but nonetheless have strongly suggested that the admission of testimony pursuant to a consistency provision violates due process. *See State v. DeWitt*, 286 N.W.2d 379, 384 (Iowa 1979) (agreeing that plea agreement requiring conformity with specific statements violates due process, but concluding that the plea agreement at issue did not so require), *cert. denied*, 449 U.S. 844 (1980); *State v. Burchett*, 399 N.W.2d 258, 266 (Neb. 1986) (same, reasoning that "it is only where the prosecution has bargained for false *or specific testimony* . . . that an accomplice's testimony is so tainted as to require its preclusion" (emphasis added) (citing *DeWitt*, 286 N.W.2d at 384)); *State v. Clark*, 743 P.2d 822, 828 (Wash. Ct. App. 1987) (citing the California Court of Appeal's decision in *Medina* for the rule that consistency provisions violate due process but finding no such provision in the case before it).

3. The Nevada Supreme Court takes a context-specific approach to testimony subject to consistency provisions, under which petitioner would also prevail: the prosecution may not present testimony subject to consistency provisions, at least when credible evidence does not corroborate the testimony. In *Franklin v. State*, 577 P.2d 860 (Nev. 1978), the Nevada Supreme Court held that "testimony becomes 'tainted beyond redemption' where the accomplice is placed under compulsion to testify in a particular fashion in order to receive the benefits of his plea bargain." *Id.* at 862. Such testimony "violates the defendant's due process rights," the court held, because it "call[s] upon an alleged 'accomplice' to

disregard his or her oath," thereby undercutting the witness's obligation to "render a full, fair, and accurate account of the facts." *Id.* at 862 & n.3.[5]

The Supreme Court of Nevada later suggested that the prosecution might be allowed to introduce testimony subject to a consistency provision when there is "[c]redible evidence" corroborating the testimony. *Leslie v. State*, 952 P.2d 966, 972–73 (Nev. 1998). Even under such a rule, however, the Nevada Supreme Court still would have condemned the testimony subject to the consistency provision in this case because Johnson's testimony was not corroborated. To the contrary, Johnson provided the only direct evidence implicating petitioner in the shooting.

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[5] Apart from concluding that presenting testimony subject to an express consistency provision violates due process, the Nevada Supreme Court also held in *Franklin* that the prosecution could not present *any* testimony subject to a plea agreement that would "reasonably cause the alleged accomplice to believe he must testify in a particular fashion," even if the agreement was not "expressly conditioned on specific testimony." 577 P.2d at 862. The Nevada Supreme Court has overruled the latter holding, making clear in *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197 (Nev. 1991), that the prosecution may, consistent with due process, "bargain in good faith for testimony represented [during plea negotiations] to be factually accurate." *Id.* at 200 & n.4. But contrary to the Illinois Supreme Court's misleading reference to *Acuna*, *see* Pet. App. 16a, the Nevada Supreme Court reaffirmed in that case that the prosecution may not present testimony "where the bargain [itself] compels the witness to provide particularized testimony." 819 P.2d at 201.

II. The Question Presented Significantly Impacts The Administration Of Criminal Justice.

This Court should resolve the constitutionality of presenting testimony subject to consistency provisions now for at least two reasons.

1. The question presented implicates the reliability and public integrity of criminal trials. There is no doubt that using accomplice testimony procured through plea bargaining is a necessary and accepted component of our criminal justice system. *See Hoffa v. United States*, 385 U.S. 293, 311 (1966). Accordingly, the prosecution may offer a benefit to an accomplice in exchange for the accomplice's agreement to testify fully and truthfully at another's trial.

At the same time, this Court repeatedly has stressed that a purported accomplice's testimony that shifts or spreads blame carries "presumptive unreliability," *Lilly v. Virginia*, 527 U.S. 116, 137 (1999), in part because accomplices have a great "interest in lying in favor of the prosecution" in order to secure more lenient treatment. *Washington v. Texas*, 388 U.S. 14, 22–23 (1967). Accomplice testimony pursuant to plea agreements that do not simply require accomplices to testify truthfully, but also that contractually require them to testify in a specific way, exacerbates these concerns. Such testimony also raises suspicions insofar as it suggests that a general truth-telling requirement will not alone produce the testimony the prosecution desires.

2. Indeed, it appears that prosecutors reserve consistency provisions for cases in which an

accomplice's blame-spreading testimony is particularly suspect. Petitioner's understanding is that neither federal prosecutors nor prosecutors' offices in some states ever insert such provisions in plea agreements; these offices simply require accomplices to give truthful testimony at trial. Nor do prosecutors' offices in the remaining states insert consistency provisions in the mine run of cases. But that does not mean that the legality of presenting testimony subject to such provisions is an inconsequential matter. To the contrary, prosecutors seem to reserve such provisions for cases in which accomplices have told prior inconsistent stories and there is no direct corroboration for the story that the prosecution wants the witness to recite:

• Here, the accomplice made several contradictory statements – only some of which implicated petitioner – before entering into his plea agreement. Indeed, he testified twice under oath in ways that conflicted with the unsworn statements to the police that his plea agreement required him to repeat at petitioner's trial. *See supra* at 3. Had Johnson not presented the most prosecution-friendly version of his story at petitioner's trial, the prosecution would have been unable to convict petitioner, as he was the only witness to directly implicate petitioner in the shooting. Pet. App. 3a–7a.

• In *Bolden*, the Tennessee case on this issue, the accomplice initially entered into a traditional plea agreement to testify against the defendant. 979 S.W. 2d at 589. Once on the stand, however, he failed to inculpate the defendant. *Id.* During a recess in the trial, the prosecution negotiated a new plea bargain

in which the accomplice agreed, in exchange for a further reduction in his sentence, to testify not only truthfully but also "as he stated in his statement to [law enforcement] on 3/21/94 at 6:05 p.m." *Id.* The prosecution then recalled the witness to the stand, where he testified as the prosecution wished. *Id.*

• In *Nerison*, the Wisconsin case on this issue, one individual involved in a theft repeatedly told law enforcement, and later testified under oath, that the defendant was not involved in the crime; another repeatedly said that he did not know whether the defendant was involved. 387 N.W.2d at 129–33. After the two alleged accomplices were convicted, however, they claimed for the first time, in exchange for newly offered promises of leniency, that the defendant *had* been involved. *Id.* at 130. The prosecution then charged the defendant and introduced this testimony at his trial, subject to the accomplices' promises to testify consistently with their new accusations and inconsistently with their prior sworn testimony. *Id.* at 132–33. The accomplices' blame-spreading testimony constituted "the only testimony specifically implicating [defendant] in the 'conspiracy.'" *Id.* at 130.

Until this Court resolves the conflict over the constitutionality of presenting testimony subject to consistency provisions, the due process rights of criminal defendants will vary based on geographic happenstance. And in those states that permit consistency provisions, prosecutors will continue to use them in precisely the kinds of cases in which it is paramount that witnesses appreciate their obligation to tell the whole truth and nothing but the truth.

III. The Illinois Supreme Court's Decision Contravenes This Court's Due Process Jurisprudence.

The Due Process Clause guarantees a fundamentally fair trial, and "the *sine qua non* of a fair trial" is "[c]ourt proceedings [that] are held for the solemn purpose of endeavoring to ascertain the truth." *Estes v. Texas*, 381 U.S. 532, 540 (1965); *see also Portuondo v. Agard*, 529 U.S. 61, 73 (2000) (The "central function of the trial . . . is to discover the truth."). Accordingly, the Due Process Clause imposes various bedrock requirements concerning witness testimony that are necessary to prevent the "corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 104 (1976); *see also Perry v. Leeke*, 488 U.S. 272, 282 (1989) (due process rules that apply to witnesses are "rules that serve the truth-seeking function of the trial.").

These truth-seeking requirements manifest themselves in two overlapping strands of jurisprudence that preclude the prosecution from deviating from the ordinary practice of requiring witnesses solely to testify truthfully and instead introducing their testimony subject to consistency provisions. First, the prosecution may not interfere with a witness's ability at trial to take an oath to tell "the whole truth." Second, the prosecution may not act as an arbiter of truth, impeding or distorting the jury's ability to determine the truth for itself according to all relevant and admissible evidence. The prosecution's presentation of testimony pursuant to consistency provisions runs afoul of both of these prohibitions.

1. In the common law tradition, "[t]he oath administered to the witness is not only that what he deposes shall be true, but that he shall depose the *whole* truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not." 3 William Blackstone, *Commentaries on the Laws of England* 372 (1768) (emphasis in original). This requirement dates back at least to 1702, when an English act declared that before giving any evidence all "witnesses . . . shall first take an Oath to depose the Truth, the whole Truth, and nothing but the Truth." 3 John Cay, *The Statutes at Large, from Magna Charta, to the Thirtieth Year of King George the Second, Inclusive* 405 (1758). Congress enshrined the whole truth oath in the Judiciary Act of 1789, requiring that witnesses "shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth." An Act to Establish the Judicial Courts of the United States § 30, 1 Stat. 73, 89 (1789).[6]

A witness's oath or affirmation is intended to "awaken the witness' conscience and [to] impress the witness' mind with the duty to [testify truthfully]."

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[6] The requirement that witnesses tell the "whole truth" also has deep roots in the particular context of accomplice testimony. In the crown witness system – the historical analogue to plea bargaining for accomplice testimony that existed at the founding – an accomplice turned state witness had to "disclose[] the whole truth" to "save himself from punishment and secure a pardon . . . . [I]f he act[ed] in bad faith or fail[ed] to testify fully and fairly, he [could] still be prosecuted as if he had never been admitted as a witness." *United States v. Ford* (*The Whiskey Cases*), 99 U.S. 594, 600 (1878).

Fed. R. Evid. 603; *see also Maryland v. Craig*, 497 U.S. 836, 845–46 (1990) (the oath "impress[es the witness] with the seriousness of the matter") (quoting *California v. Green*, 399 U.S. 149, 159 (1970)). It also "guard[s] against the lie by the possibility of a penalty for perjury." *Green*, 399 U.S. at 158; *see also The Pizarro*, 15 U.S. (2 Wheat.) 227, 240 (1817) (Story, J.) (when witnesses "are bound to declare the whole truth" they cannot "fraudulently suppress any material facts").

Given the longstanding centrality of the oath to the truth-seeking process of trial, the Due Process Clause prohibits the prosecution from presenting testimony from a witness who is unwilling, or compromised in his ability, to testify to the whole truth. The prosecution, for example, may not knowingly present false testimony at trial. *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935) (per curiam). Nor may it allow one of its witness's testimony that it knows to be false or incomplete to stand uncorrected. *See Napue v. Illinois*, 360 U.S. 264, 269–70 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam).

Presenting accomplice testimony subject to a consistency provision interferes with the sanctity and function of the oath in much the same way. Consistency provisions require witnesses to adhere to prior, *unsworn* statements on the stand. Pet. App. 68a. What is more, such provisions make it a breach of contract for witnesses to give testimony that deviates from the prosecution's theory of the case. Presenting accomplice testimony subject to consistency provisions, therefore, "taint[s] the truth-seeking function of the courts by placing undue pressure on witnesses to stick with one version of the

fact regardless of its truthfulness." *Fisher*, 859 P.2d at 184 (Ariz. 1993). It also effectively removes the threat of perjury, for accomplices under consistency provisions know that it is highly improbable that the state will later charge that the story the prosecution itself foreordained as the "truth" was actually a lie.

Presenting testimony subject to consistency provisions also subverts the truth-seeking process in a more subtle way. It is commonplace for a witness to "modify his testimony in the light of a refreshed recollection." *Mattox v. United States*, 156 U.S. 237, 252 (1895) (Shiras, J. dissenting). Witnesses also sometimes realize simply through rigorous cross-examination that certain details in prior statements were incorrect. A witness under an unfettered obligation to tell the "whole truth" can clarify or revise his testimony in such situations without fear that the prosecution will rescind his plea bargain. A witness subject to a consistency provision, however, faces a powerful disincentive to clarify or revise inadvertently incorrect prior statements – especially if he believes that the details at issue might call into question the prosecution's theory of the case. The Due Process Clause does not allow the prosecution to interfere in this manner with the oath to tell the whole truth.

2. The prosecution's presentation of testimony subject to a consistency provision contravenes due process for another, related reason: It arrogates to the prosecution the factfinder's duty to determine the ultimate truth of the prosecution's charges.

Under the Anglo American system of trial by jury, the prosecution and the defense present their dueling versions of the truth, and the jury decides

whether the prosecution has proven the defendant's guilt beyond a reasonable doubt. The Due Process Clause, in other words, "preserve[s] the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles v. Whitley*, 514 U.S. 419, 440 (1995). The prosecution thus may not withhold material exculpatory evidence from the jury's purview. *Id.* at 432; *see also Brady v. Maryland*, 373 U.S. 83 (1963). Nor may a prosecutor "vouch" for a witness's testimony, suggesting that she has personal knowledge beyond the evidence presented to the jury of what the truth is. *Young v. United States*, 470 U.S. 1, 18–19 (1985); *see also, e.g.*, *Hall v. United States*, 419 F.2d 582, 585–87 (5th Cir. 1969). Nor may the prosecution introduce witness identification testimony that it has unduly influenced before putting the witness on the stand. *Foster v. California*, 394 U.S. 440, 443 (1969); *see also Manson v. Brathwaite*, 432 U.S. 98, 116 (1977). If the state "[i]n effect, . . . repeatedly [says] to the witness, 'This is the man,'" the witness's testimony becomes tainted beyond repair. *Foster*, 394 U.S. at 443.

Presenting accomplice testimony pursuant to a consistency provision similarly gives primacy to the prosecutor's "private deliberations" over the jury's role as finder of fact. When the prosecution contractually requires an accomplice's trial testimony to be consistent with particular prior statements, the prosecution predetermines the veracity of its own charges just as surely as when the prosecution presents testimony from a witness whom it subjected to an unduly suggestive line-up. In both situations, the prosecution "define[s] the truth in its own terms,"

Nerison, 387 N.W.2d at 325, effectively telling the witness, "this is what the truth is, and this is what you should (or, in the case of a consistency provision – must) tell the jury." Such actions interfere with the jury's ability to hear untainted testimony and to decide for itself whether the prosecution's allegations are true.

3. The Illinois Supreme Court did not dispute that presenting testimony subject to a provision in a plea agreement that subverts the truth-seeking process of trial violates the Due Process Clause. It held, however, that introducing testimony subject to a consistency provision does not have this effect because: (a) the presence of standard plea terms render truthfulness "the overriding requirement" of an agreement even when a consistency provision is present; and (b) cross-examining a witness who is subject to a consistency provision can address any residual concerns regarding its influence on the witness. Pet. App. 17a–18a. Neither of these arguments has merit.

a. Neither a plea agreement's general requirement that the witness testify truthfully nor a provision voiding the agreement if the witness's prior statements to law enforcement turn out to be false – both standard provisions in plea agreements and present in the agreement at issue here – prevents a consistency provision from tainting the testimony of a witness who is subject to it. As the dissent below noted, "the State has no crystal ball to know what the 'truth' is – it only knows what statements are consistent." Pet. App. 28a. If an accomplice adheres to the details of his prior, unsworn statement at the expense of telling the whole truth, the accomplice will

retain the benefit of his bargain so long as the prosecution does not independently discover that the factual inaccuracies in the testimony. But if an accomplice tells the truth but testifies inconsistent with his prior unsworn statements, the accomplice will obviously breach his plea agreement and lose the benefit of his bargain. Under these circumstances, an accomplice feels pressure to stick the prosecution's preferred version of events, regardless of its veracity, in a way that exceeds the ordinary dynamics of testifying pursuant to an ordinary plea bargain. A consistency provision, in short, limits the truthfulness of witness testimony and the effect of the witness's oath – not the other way around.

In the end, the proof is in the pudding: If general truthfulness requirements actually trumped the influence of consistency provisions, then prosecutors would never have reason to insert consistency provisions into plea agreements. A standard plea agreement would always suffice. Yet the State insisted here that Johnson testify here subject to a consistency provision, and prosecutors in other cases sometimes likewise deviate from standard practice. *See supra* at 17–18. The only reasonable inference from this reality is that prosecutors themselves believe that consistency provisions have some influence on witnesses that goes above and beyond customary truth-telling obligations.[7]

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[7] At a minimum, presenting testimony subject to a consistency provision violates the Due Process Clause in cases, such as this one, in which there is no reliable, objective way to determine the "truth" (because there is no physical or other

b. Nor does the fact that an accomplice who testifies subject to a consistency provision is, like any other witness, "subject to searching cross-examination," Pet. App. 17a–18a (quotation omitted), cure the taint that such a provision creates either. When prosecutorial tactics interfere with the truth-seeking process, this Court has never suggested, much less held, that a defendant's opportunity for cross-examination cures such prosecutorial misconduct. *See Napue*, 360 U.S. at 269–70; *Alcorta*, 355 U.S. at 31.

Furthermore, even if the sole constitutional concern here were, as the Illinois Supreme Court suggested, Pet. App. 18a, one of witness credibility, cross-examination concerning the effect of a consistency provision would not solve the due process problem. Federal courts of appeals have held that prosecutors violate the Due Process Clause when they introduce into evidence a plea agreement with even an ordinary truthfulness provision *and* suggest to the jury – either by other language in the agreement itself or by argumentation – that they have "independently verified the truthfulness of the [accomplice's] testimony." *United States v. Harlow*, 444 F.3d 1255, 1263 (10th Cir. 2006); *see also United States v. Binker*, 795 F.2d 1218, 1222 n.2, 1227 (5th

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direct evidence corroborating the witness's story) and the State picks its preferred version of testimony out of a witness's own numerous conflicting accounts. *See Leslie*, 952 P.2d at 972–73 (suggesting that presenting testimony subject to consistency violates due process at least when no "credible evidence" corroborates the witness's prior statements).

Cir. 1986). Such action constitutes impermissible vouching; it implies "that the prosecutor knows what the truth is and is assuring its revelation." *United States v. Brown*, 720 F.2d 1059, 1073 (9th Cir. 1983) (quoting *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980)).

A consistency provision sends the same message of independent prosecutorial knowledge of the truth; it expresses the prosecution's belief that the witness's testimony is truthful insofar as it tells a certain story. Consequently, the prospect of cross-examination on the basis of such a provision presents, at best, a Hobson's choice: whatever gains a defendant might make by attacking the accomplice's credibility come at the expense of revealing to the factfinder that the prosecution seemingly "knows what the truth is and is assuring its revelation." *Id.* Due process does not allow the prosecution to put the defendant in such a bind.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 24, 2010

APPENDIX

APPENDIX A

SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

v.

JAMES BANNISTER,

Appellant.

No. 105887

Oct. 29, 2009

Chief Justice FITZGERALD delivered the judgment of the court, with opinion.

OPINION

Defendant James Bannister was convicted of two counts of first degree murder and sentenced to natural life imprisonment for his role in a gang-related shooting. His convictions and sentence were affirmed on direct appeal. *People v. Young*, 263 Ill. App. 3d 627, 635 N.E.2d 473 (1994). The defendant then filed a postconviction petition, alleging actual innocence because the key witness for the State had recanted his trial testimony. The trial court granted the defendant's petition, vacated his convictions, and ordered a new trial. After a bench trial, the defendant was again convicted of two counts of first degree murder and sentenced to life imprisonment. On appeal, the defendant asserted that, *inter alia*, he was denied due process and deprived of a fair trial because the State had entered into a plea agreement containing a so-called consistency provision with one of the defendant's accomplices. The appellate court affirmed

the defendant's convictions and sentences. 378 Ill. App. 3d 19, 880 N.E.2d 607.

For the reasons that follow, we also affirm.

BACKGROUND

On November 9, 1989, several men shot at Dan Williams from around a building in the Stateway Gardens housing complex in Chicago. Williams ran away from the gunfire and toward a building on the campus of the Illinois Institute of Technology (IIT). Williams was shot and killed at the revolving door of the building. Thomas Kaufman, a security guard inside the building, was shot and killed by a stray bullet. The defendant and several of his fellow gang members, including Michael Johnson, were charged with murder.

At trial, the only direct evidence against the defendant was the testimony of Deanda Wilson, a 12-year-old member of a rival gang. Wilson testified that on the night of the shooting he saw the defendant and six other men around a building in the Stateway Gardens housing complex. According to Wilson, Williams was near a play lot in front of the building when someone called out to him. Following a verbal exchange, the defendant and his fellow gang members shot at Williams, and Williams stumbled toward the IIT building. Wilson stated that the shooting continued for about 15 seconds before the defendant and his accomplices fled. The defendant presented an alibi defense, calling four witnesses who testified that he was at home at the time of the shooting. A jury found the defendant guilty of two counts of first degree murder, and he was sentenced to life imprisonment. The defendant's convictions and sentence were

affirmed on direct appeal. *Young*, 263 Ill. App. 3d 627, 635 N.E.2d 473.

In April 1993, the defendant filed a *pro se* postconviction petition, and more than two years later in July 1995, defense counsel filed a supplemental petition, alleging actual innocence based on Wilson's recantation of his trial testimony implicating the defendant. The trial court dismissed the defendant's petition without an evidentiary hearing, but the appellate court reversed and remanded. The appellate court held that the trial court should have conducted an evidentiary hearing regarding Wilson's recantation. On remand, the circuit court conducted an evidentiary hearing and found that, with respect to the defendant, Wilson's trial testimony was not accurate and truthful and that there was no corroboration for his implication of the defendant. The court concluded that the outcome of the defendant's trial likely would have been different without Wilson's perjured testimony. The trial court granted the defendant's request for postconviction relief, vacated his convictions and sentences, and ordered a new trial.

The defendant waived his right to a jury trial, and the cause proceeded to a bench trial. The State's key witness was the defendant's accomplice, and a codefendant at his first trial, Michael Johnson. Johnson, who had been tried separately, had also been convicted of both murders and sentenced to natural life imprisonment. Johnson agreed to testify against the defendant pursuant to a plea agreement with the State. The agreement stated:

> "IT IS AGREED that Michael Johnson will testify truthfully in all matters regarding the

1st degree murders of Dan Williams and Thomas Kaufman, which occurred on November 9, 1989, at approximately 10:00 p.m. at or near 3517-19 S. Federal, Chicago, Cook County, Illinois. Such truthful testimony shall be consistent with Michael Johnson's post-arrest statements in [*sic*] December 28, and December 29, 1989, to Chicago Police officers and Cook County Assistant State's Attorneys and his statements made to Cook County State's Attorney personnel during his pre-plea agreement interviews on April 29 and May 24, 2004.

It is agreed that Michael Johnson will testify truthfully in the case of *People v. James Bannister* * * *.

In exchange for Michael Johnson's truthful testimony in the above matters, it is agreed that Michael Johnson shall withdraw all appeals and post-conviction petitions in his case, * * * and forever waive any and all future appeals, post-conviction petitions or motions to vacate pleas. It is further agreed that the parties will move to vacate the existing sentence in Michael Johnson's case * * * and that the case will be placed back on the Honorable James Schreier's trial call. It is agreed that Michael Johnson shall plead guilty to the 1st degree murder counts involving Dan Williams, and the State will nolle pros the 1st degree murder counts involving Thomas Kaufman. The State will recommend that Judge Schreier resentence Michael Johnson to 60 years in the Illinois

> Department of Corrections ('I.D.O.C.'). This agreement is contingent on Judge Schreier's acceptance of its terms in their entirety.
>
> It is further agreed that the State shall place Michael Johnson in the Witness Program Living Unit until his trial testimony in open court is completed. After his testimony is completed, Michael Johnson shall be remanded to the I.D.O.C. The State shall recommend to I.D.O.C. that Michael Johnson be segregated from * * * co-defendants and that Michael Johnson be housed in a medium-security prison, or, if that's not possible, in the Pontiac Correctional Center."

The agreement also contained a page of limitations, which stated that the agreement was "null and void" if Johnson failed "to truthfully testify under oath in open court" against the defendant or his representations "during his post-arrest statements and his pre-plea agreement interviews, upon which this agreement was predicated" were found false. Johnson, his attorney, and two assistant State's Attorneys signed the agreement.

At trial, the State called Johnson as a witness and asked him first about the agreement. Johnson stated that his understanding was that in exchange for his testimony and guilty plea, the State would "nolle" one of the murder counts, recommend a sentence of 60 years, and request that he be transferred from Tamms Correctional Center, Illinois' "super-max" prison. Johnson understood that his sentence remained within the trial judge's discretion and that his transfer

remained within the discretion of the Department of Corrections.

Johnson then testified about the murders. According to Johnson, in 1989, he had been a member of the Gangster Disciples street gang for approximately 10 years. On the evening of November 9, 1989, he was walking through the Stateway Gardens housing complex with James Young and Michael Meyers when they met the defendant, Eric Smith, Thomas Carter, and Kevin Young at an apartment building in the complex. All seven men went upstairs to the apartment of Kevin Young's niece and talked for an hour about the recent sexual assault of Young's girlfriend. The men believed that Young's girlfriend had been assaulted by members of the Del Vikings street gang, and they hatched a plan to shoot Del Vikings in revenge.

The men then armed themselves, left the apartment, and proceeded to another building in the complex. There, they encountered a man known as "Rick James," who greeted the defendant by his nickname. Kevin Young shot at "Rick James." The men returned to the apartment of Kevin Young's niece, where they talked and smoked for approximately an hour. The men again left the apartment and proceeded to another building in the complex. There, they encountered Daniel Nicholson, whom they robbed. The men went to the building where they began, and where Johnson lived. Johnson testified that he went upstairs to his apartment to get a ski mask for himself and some "wave" caps for Kevin Young and Carter.

According to Johnson, the men walked to yet another building in the complex. Standing near the

building, Johnson heard Smith say, "Come here, mother* * *." After hearing gunshots, he walked with Meyers to the front of the building, where he saw Williams running while the defendant, Smith, Carter, Kevin Young, and James Young were firing their guns at him. Johnson testified that he shot at Williams as he crossed a play lot, jumped the fence, and ran toward the IIT building. According to Johnson, when the shooting eventually stopped, the seven men went to an apartment in another building and waited until the police left the area.

Johnson's testimony was substantially consistent with the statement that he gave to the police on December 29, 1989, the day after his arrest. Johnson acknowledged that he initially denied any involvement in the shootings and that, prior to his trial, he had moved to suppress his inculpatory statement, asserting that he had not been advised of his constitutional rights by the police. Johnson stated that the basis for this motion was untrue because he had been advised of his rights before making his statement. Defense counsel rigorously cross-examined Johnson as to the specific terms of the plea agreement and his motivation for entering into the agreement.

As he had in his first trial, the defendant again presented an alibi defense and called several witnesses who testified that he was at home on the night of the shootings. The trial court found the defendant guilty on both counts of first degree murder and sentenced him to life imprisonment.

The defendant appealed, raising the issue of the constitutional validity of the State's plea agreement with Johnson. The appellate court affirmed his

conviction and sentence, holding that the defendant was not denied due process. 378 Ill. App. 3d 19, 880 N.E.2d 607. We allowed the defendant's petition for leave to appeal. 210 Ill. 2d R. 315(a).

ANALYSIS

The central issue in this appeal is whether the plea agreement between the State and Johnson violated the defendant's right to due process. Our review is *de novo*. *People v. Burns*, 209 Ill. 2d 551, 560, 809 N.E.2d 107 (2004); *People v. Lindsey*, 199 Ill. 2d 460, 463, 771 N.E.2d 399 (2002).

Initially, the defendant argues that he has standing to challenge the validity of this plea agreement. The defendant asserts that, while plea agreements are guided by contract law principles, these principles must give way when an agreement raises constitutional concerns. According to the defendant, "When others conspire to illegally develop evidence against a defendant, due process and fundamental fairness require that a defendant must have * * * standing to challenge that conduct."

Absent due process concerns, the validity of a plea agreement is generally governed by contract law. *People v. Henderson*, 211 Ill. 2d 90, 103, 809 N.E.2d 1224 (2004); *People v. Evans*, 174 Ill. 2d 320, 326, 673 N.E.2d 244 (1996). Under contract law, there is a strong presumption that the agreement benefits the parties to it, and not a third party, and this presumption may be overcome only by evidence manifesting an affirmative intent by the parties to benefit the third party. See *Estate of Willis v. Kiferbaum Construction Corp.*, 357 Ill. App. 3d 1002,

1007, 830 N.E.2d 636 (2005), citing *Bates & Rogers Construction Corp. v. Greeley & Hansen*, 109 Ill. 2d 225, 486 N.E.2d 902 (1985). Here, the defendant was not an intended beneficiary of the plea agreement between the State and Johnson. Therefore, he lacks standing to argue that the agreement was invalid.

The defendant compares the State's actions here in procuring Johnson's testimony to efforts by the State to secure involuntary confessions. According to the defendant, however, his argument differs from that of a defendant vicariously raising a fourth amendment claim because he was the "direct target" of the State's conduct. The defendant, however, neither explains his reasoning nor cites any authority in support of it. Any defendant aggrieved by the introduction of evidence produced by an illegal seizure against a third party could make the same argument, but that argument would fail. See *People v. Kidd*, 178 Ill. 2d 92, 135, 687 N.E.2d 945 (1997) ("A fourth amendment violation can be urged successfully only by those whose rights have actually been violated by the search itself, not by those who have been aggrieved solely by the introduction of damaging evidence"). The State negotiated with Johnson to secure his testimony. Indeed, the State often bargains for accomplice testimony. The fact that that testimony would be used at the defendant's trial is unremarkable. Further, the defendant's argument that the State lacked the authority to enter into a plea agreement with Johnson is unavailing. Under the revestment doctrine, litigants may revest a trial court with personal and subject matter jurisdiction, after the 30-day period following final judgment, if they actively participate in proceedings that are inconsistent with the merits of the prior judgment. See *People v.*

Minniti, 373 Ill. App. 3d 55, 65, 867 N.E.2d 1237 (2007), citing *People v. Kaeding*, 98 Ill. 2d 237, 240-41, 456 N.E.2d 11 (1983); *People v. Henry*, 329 Ill. App. 3d 397, 403, 769 N.E.2d 34 (2001).

The larger problem for the defendant is that even if he had standing to contest the validity of the agreement, its validity would not affect its admissibility. That is, even if the trial court, in the case against the defendant, had somehow found a reason to reach the validity of Johnson's plea agreement—an agreement that was still executory and had yet to be accepted by the trial court—and invalidated it, the remedy would not have been to suppress his testimony. The remedy would have been to void the agreement. As the appellate court correctly observed, a plea agreement between a witness and the State that cannot be enforced has no effect on the admissibility of that witness' testimony at trial. 378 Ill. App. 3d at 35, 880 N.E.2d 607, citing *People v. Caban*, 318 Ill. App. 3d 1082, 1087-89, 743 N.E.2d 600 (2001). If the agreement had been deemed invalid, Johnson would have remained convicted of two murders and remained incarcerated at Tamms, and his testimony would have remained in the case against the defendant.

However, even though the defendant lacks standing to challenge the validity of the agreement, he does not lack the ability to challenge Johnson's testimony. A defendant may always question a witness on matters affecting his credibility and bias. The issue, then, becomes whether the plea agreement itself so undermined Johnson's credibility that we must conclude the defendant was denied a fair trial.

We note that the defendant does not challenge the sufficiency of the evidence against him. The defendant argues simply that, as a matter of constitutional law, a plea agreement by which the State secures an accomplice's testimony is invalid when it contains a so-called consistency provision. According to the defendant, plea agreements that place a witness under a strong compulsion to testify in a particular fashion should be condemned by this court. The defendant insists, "The State cannot require [a] co-defendant to tell the truth and then tell the co-defendant what is the truth." The defendant concedes that if the plea agreement had simply required Johnson to testify truthfully, he would have had the opportunity to do so. But the State took away this opportunity when it told him that the truth was his postarrest and court-reported statements in 1989, and his statements to prosecutors in 2004.

The defendant relies primarily upon *People v. Medina*, 116 Cal. Rptr. 133 (Ct. App. 1974), and *State v. Fisher*, 859 P.2d 179 (Ariz. 1993). In *Medina*, two defendants were charged with murder. Three of their accomplices testified against them pursuant to agreements in which the accomplices received immunity in exchange for testimony consistent with prior recorded statements. The California Court of Appeal held that "a defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." *Medina*, 116 Cal. Rptr. at 145.

However, the rule in *Medina*, which seems so categorical to the defendant, was clarified in a subsequent case. In *People v. Jenkins*, 997 P.2d 1044, 1119-20 (Cal. 2000), the California Supreme Court rejected the contention that the testimony of an accomplice pursuant to a plea agreement is inherently unreliable. That court held that a plea agreement requiring an accomplice testify fully and truthfully is valid, "even if it is clear the prosecutor believes the witness's prior statement to the police is the truth, and deviation from that statement in testimony may result in the withdrawal of the plea offer." *Jenkins*, 997 P.2d at 1120. Such an agreement does not dictate the accomplice's testimony in a manner that would offend due process. *Jenkins*, 997 P.2d at 1120.

In *Fisher*, the defendant was charged with first degree murder. At trial, the defendant's wife invoked her fifth amendment rights and refused to testify, but a letter memorializing an agreement between her and the State was admitted into evidence. The letter, signed by the defendant's wife and her attorney, stated that she agreed that her testimony at trial would not "vary substantially" from prior statements she had made to police. The defendant was convicted of first degree murder and sentenced to death. He then filed a motion for a new trial based on newly discovered evidence—namely, his wife's confession to the murder. The trial court granted this motion, and the State appealed. The Arizona Supreme Court affirmed, holding that plea agreements with consistency provisions, but without any overriding requirements of truthfulness, "undermine the reliability and fairness of the trial and plea bargaining process and taint the truth-seeking function of the courts by placing undue

pressure on witnesses to stick with one version of the facts regardless of their truthfulness." *Fisher*, 859 P.2d at 184.

But in a subsequent case, the Arizona Supreme Court explained:

> "The critical issue is not whether the witness will feel an obligation to testify to the same facts earlier told the prosecutors or police, but rather whether the prosecution has conditioned the plea agreement upon such testimony, regardless of the truth of the earlier statement. [Citation.] All accomplice plea agreements put some pressure on a cooperating witness. [Citation.] But a consistency agreement has the strong potential to procure untruthful testimony if the agreement is not also conditioned upon the requirement of truthful testimony. [Citation.] It is this tainting of the 'truth-seeking function of the courts' that makes consistency provisions invalid. [Citation.]" *State v. Rivera*, 109 P.3d 83, 86 (Ariz. 2005).

The *Rivera* court noted that safeguards, such as full disclosure of the plea agreement to the finder of fact and cross-examination, adequately protect a defendant's rights. *Rivera*, 109 P.3d at 87; see *State v. Nerison*, 401 N.W.2d 1, 4 (Wis. 1987) ("Cross-examination, not exclusion is the proper tool for challenging the weight and credibility of accomplice testimony").

The appellate court here relied on *State v. Bolden*, 979 S.W.2d 587 (Tenn. 1998), and *People v. Jones*, 600 N.W.2d 652 (Mich. Ct. App. 1999). In *Bolden*, the defendant and an accomplice were charged with first

degree murder. The accomplice entered a plea agreement with the State, under which he agreed to plead guilty and testify truthfully, and consistent with an earlier statement to the police, against the defendant in exchange for a reduced sentence. The defendant was convicted and appealed.

The Supreme Court of Tennessee observed that accomplice testimony is generally admissible even if it results from a plea agreement. *Bolden*, 979 S.W.2d at 590. The court noted, though, that other courts have required safeguards to be followed before admitting such testimony; these safeguards include the full disclosure of the terms of any plea agreement and the opportunity for full cross-examination. *Bolden*, 979 S.W.2d at 590. The court further noted that other courts have added the requirement that such testimony may not be conditioned on the witness following a script. The court stated that "'it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require . . . preclusion.'" *Bolden*, 979 S.W.2d at 591, quoting *State v. Burchett*, 399 N.W.2d 258, 266 (Neb. 1986). The court distinguished on their facts cases in which the plea agreement required only that the witness testify in a particular fashion or that the testimony produce a specific result, without regard to the truthfulness of the testimony. *Bolden*, 979 S.W.2d at 592 n.3. The *Bolden* court stated that because the plea agreement specifically required the codefendant to testify truthfully, that condition "necessarily engulfed" the other terms in the agreement, which "hinged upon truthful testimony." *Bolden*, 979 S.W.2d at 592. The court held that the codefendant's testimony did not

violate the defendant's rights to due process and a fair trial. *Bolden*, 979 S.W.2d at 593.

In *Jones*, the defendant was charged with first degree murder. At trial, four accomplices testified against the defendant pursuant to plea agreements. These agreements required the accomplices to testify truthfully about the defendant's involvement in the offense, and consistent with their original statements to the police, in return for immunity. The defendant was convicted, and on appeal argued that he was denied due process because the plea agreement required the accomplice to provide specific testimony.

The Michigan Court of Appeals initially stated that "in most cases, a promise of immunity or other favorable treatment is relevant only to the issue of the credibility of the witness, and not to the admissibility or the immunized testimony." *Jones*, 600 N.W.2d at 656. The court acknowledged that several state courts have held that the prosecution may not bargain with an accomplice in exchange for testimony conforming to a script, without regard for the truth. *Jones*, 600 N.W.2d at 656. Underlying this rule, asserted the court, was the concern that a witness placed under a strong compulsion to testify to a particular version of events is "no longer a free agent whose credibility can be evaluated" by the finder of fact. *Jones*, 600 N.W.2d at 656. The court observed that although the immunity agreements may provide some incentive for the witnesses to conform their trial testimony to their prior accounts of the incident, they did not violate the defendant's rights where the prosecution expressly conditioned its grants of immunity on the promises that the witnesses would provide truthful testimony.

Jones, 600 N.W.2d at 657. The *Jones* court concluded that when a prosecutor makes the decision to bargain with a witness on the basis of representations made by the witness during negotiations with the State, it is reasonable for the prosecutor to rely on the witness' assertion that such representations are truthful and to expect that the witness' trial testimony would be essentially consistent with the original information upon which the State's promise of leniency was induced. *Jones*, 600 N.W.2d at 657. We find *Bolden* and *Jones* persuasive.

"There is no question that '[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice.'" *Henderson*, 211 Ill. 2d at 102, 809 N.E.2d 1124, quoting *Santobello v. New York*, 404 U.S. 257, 260 (1971). The State may bargain directly with a defendant to dispose of a case, or it may bargain with a defendant's accomplice to secure testimony against the defendant in an effort to dispose of a case. Though accomplice testimony by its nature is fraught with serious weaknesses, it is generally admissible at trial, even where it was procured by an offer of a lenient sentence and secured by a plea agreement. See *People v. Tenney*, 205 Ill. 2d 411, 429, 793 N.E.2d 571 (2002). That is, "bargaining for specific trial testimony, *i.e.*, testimony that is essentially consistent with the information represented to be factually true during negotiations with the State, and withholding the benefits of the bargain until after the witness has testified, is not inconsistent with the search for truth or due process." *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197, 200 (Nev. 1991); see

also *State v. Clark*, 743 P.2d 822, 828 (Wash. Ct. App. 1987) ("[j]ust because an immunity agreement rests on a premise that the requested testimony will be of some benefit to the State, the agreement is not necessarily rendered impermissibly coercive"). It is reasonable for the State to condition its largesse toward an accomplice on the accomplice testifying consistently with what the State believes is the truth, as long as the agreement's overriding requirement is that the accomplice also testify truthfully.

Here, the plea agreement repeatedly and explicitly obligated Johnson to testify truthfully. The agreement also provided that Johnson would testify in a manner that was consistent with his prior statements to police and to prosecutors, but if any of the representations contained in his prior statements were found to be false, the agreement would be rendered null and void. Truthfulness was the overriding requirement of the agreement. The agreement neither compelled Johnson to disregard his witness' oath, nor bound him to a particular script or result. Accordingly, Johnson's testimony was not tainted by the plea agreement, and the admission of his testimony did not violate the defendant's rights to due process and a fair trial.

Our legal system tests a witness' credibility through cross-examination and leaves the determination of that credibility to the finder of fact. See *People v. Evans*, 209 Ill. 2d 194, 213, 808 N.E.2d 939 (2004), quoting *Hoffa v. United States*, 385 U.S. 293, 311 (1966).

> "In most instances, any potential for prejudice to a defendant's case will be avoided by allowing the witness to testify subject to searching cross-

> examination intended to develop fully any evidence of bias or motive on the part of the witness, or improper conduct on the part of the State. Every fact that might in some way influence the truthfulness and credibility of the witness's testimony should be laid before the [finder of fact]. [Citation.] This ensures no unnecessary barriers will be imposed on the State's ability to bargain for truthful testimony, and at the same time ensures the [finder of fact] will be able to determine what weight, if any, in light of all the evidence, to give the witness's testimony." *State v. McGonigle*, 401 N.W.2d 39, 42 (Iowa 1987).

The State, on direct examination of Johnson, fully disclosed the terms of the plea agreement with him, and the defendant had an opportunity to cross-examine Johnson about the agreement and the benefits he would receive. The trial court heard the details of Johnson's plea agreement and found him to be credible nonetheless. As the finder of fact, it was the trial court's responsibility to resolve alleged inconsistencies and conflicts in the evidence, as well as to weigh the testimony and determine the credibility of the witnesses. See *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178 (2006).

CONCLUSION

For the reasons that we have stated, we affirm the judgment of the appellate court.

Affirmed.

Justices THOMAS, GARMAN and KARMEIER concurred in the judgment and opinion.

Justice FREEMAN dissented, with opinion, joined by Justices KILBRIDE and BURKE.

Justice FREEMAN, dissenting:

This appeal presents significant constitutional issues of first impression for Illinois courts, defining the limits of the State's power to secure testimony against an accused by entering into a contingent plea agreement with an already-convicted accomplice which requires him to testify "truthfully," but also "consistently" with certain prior statements. It is my view that these serious matters require in-depth analysis and careful consideration of the defendant's arguments that such plea agreements violate an accused's right to due process and a fair trial because they unduly interfere with the truth-seeking process and, therefore, should be prohibited in our courts. Because my colleagues now place their stamp of approval upon the State's use of contingent plea agreements containing consistency clauses without addressing any of the arguments advanced by defendant in the context of the unique facts of this appeal, I cannot join the majority opinion.

Defendant was convicted in 1991 of two counts of first degree murder and sentenced to life imprisonment. During that trial, the State's sole witness against defendant was a 12-year-old rival gang member, who testified that he saw defendant shoot the victims. Subsequently, however, this witness recanted his testimony, and, during postconviction proceedings, defendant was granted a new trial. It is this second trial, which took place in 2004, which is the subject of this appeal. The State's only direct evidence against defendant in this new trial came

through the testimony of Michael Johnson. Although Johnson had been a codefendant during the 1991 prosecution, he was tried separately, and the State did not present testimony from Johnson against defendant during those proceedings. Like defendant, Johnson had been convicted by a jury of two counts of first degree murder and sentenced to natural life imprisonment with no possibility of parole. Johnson was incarcerated at Tamms Correctional Center, a "super" maximum-security facility, when the State approached him in January 2004—13 years after the jury convicted him of double murder—with the offer of a plea bargain in exchange for his testimony against defendant in defendant's second trial. For six months—from January to June 2004—the State negotiated the terms of this plea agreement with Johnson.

Ultimately, the parties struck a deal in which Johnson would "testify truthfully" against defendant. The agreement required that "[s]uch truthful testimony *shall* be consistent with" (emphasis added) two of the several postarrest statements Johnson made to law enforcement officials subsequent to his arrest for the murders in 1989, as well as with Johnson's preplea agreement interviews with the State, which occurred in April and May 2004. As part of his plea, Johnson agreed to "withdraw all appeals and post-conviction petitions in his case," and "forever waive any and all future appeals, post-conviction petitions or motions to vacate pleas." In exchange, the State agreed to "move to vacate [Johnson's] existing sentence," and promised that Johnson's "case will be placed back on the [circuit court's] trial call." The agreement called for Johnson to then plead guilty to

one count of first degree murder, and provided that the State would "*nolle pros*" the second first degree murder count of which Johnson had previously been convicted. Finally, the State agreed to recommend that Johnson be resentenced to 60 years' incarceration, and that he be moved from the Tamms facility to a lower-level medium-security facility to serve the remainder of his sentence.

Johnson thereafter testified during defendant's second trial. It was only *after* defendant was convicted that the plea agreement between Johnson and the State was executed. The circuit court's docket sheet reflects that on July 27, 2004, Johnson's "conviction of 2 counts of murder [was] vacated by agreement of the parties." Thus, as a result of Johnson's cooperation with the State and adherence to the provisions in the plea agreement, his two jury convictions for first degree murder entered 13 years earlier were erased, he pled guilty to only one count of first degree murder, was resentenced to 60 years' imprisonment with credit for time already served, and was transferred from Tamms to a lower-security facility.

Defendant in this court questions the propriety of the plea agreement between Johnson and the State, asserting that his constitutional right to due process and a fair trial were violated by the method employed by the State in securing Johnson's testimony, which was then used against defendant to obtain a conviction in his second trial. In addition, defendant also advances the broader argument that this court should generally prohibit the use of consistency clauses in contingency plea agreements, as such clauses interfere with due process and the search for the truth, placing

a witness under a strong compulsion to testify to a particular set of facts and virtually "scripting" the witnesses' testimony.

The majority holds that defendant lacks standing to contest the validity of the plea agreement entered into between the State and Johnson. Defendant argues that he has met the requirements for standing in that he has demonstrated an injury to a legally cognizable interest, that the injury is traceable to the State's actions and that it is substantially likely to be redressed. See *Village of Chatham v. County of Sangamon*, 216 Ill. 2d 402, 419-20, 837 N.E.2d 29 (2005). Specifically, defendant asserts that the State's use of Johnson's testimony against him, procured through a plea agreement containing a consistency clause, violated his legally cognizable interest in due process and a fair trial. The majority, however, never squarely addresses defendant's contention in the context of the specific facts of this case. Instead, my colleagues generally state that "[a]bsent due process concerns, the validity of a plea agreement is generally governed by contract law." 236 Ill. 2d at 9, 923 N.E.2d at 249. They then note that under general contract principles there is a strong presumption that the agreement benefits the parties to it and not a third party, and that this presumption may only be overcome by showing that the parties to the agreement had an affirmative intent to benefit the third party. The majority then summarily states that under these contract principles, defendant "lacks standing to argue that the agreement was invalid." 236 Ill. 2d at 10, 923 N.E.2d at 249.

Although the majority notes the general rule that contract provisions govern plea agreements "absent due process concerns," and strictly confines its discussion of standing to an application of contract principles, it is precisely the aforementioned "due process concerns" which animate defendant's argument and which are not addressed by the majority's opinion. The arguments raised by defendant implicate more than simple citation to general contract principles. As defendant notes, this court has previously observed in a related context that the underlying "contract" right in plea bargains are "constitutionally based and therefore reflect[] concerns that differ fundamentally from and run wider than those of commercial contract law," and that, because of this, "the application of contract law principles to plea agreements may require tempering in some instances." *People v. Evans*, 174 Ill. 2d 320, 326-27, 673 N.E.2d 244 (1996). I am unconvinced by the majority's terse analysis that no considerations other than those of contract law come into play under the specific facts presented here.

In addition, the majority gives short shrift to defendant's argument questioning the authority of both the State and the circuit court to erase a jury conviction for double murder 13 years after its entry. According to defendant, upholding the plea bargain between Johnson and the State under the specific circumstances presented in this case is tantamount to holding that the State has the absolute authority to overturn a jury verdict of guilty. Defendant explains that this occurs through the offer of a plea bargain wherein the State determines which of various statements made by a witness are "true," and then

compels that witness to adhere to these statements throughout his testimony under the requirements of the consistency clause. In addition, defendant argues that the circuit court lacked jurisdiction to vacate Johnson's two jury convictions, entered 13 years earlier.

In its opinion, the majority briefly references "defendant's argument that the State lacked the authority to enter into a plea agreement with Johnson," and immediately finds it "unavailing." 236 Ill. 2d at 10, 923 N.E.2d at 249. The majority disposes of defendant's serious contentions in one sentence, holding that "[u]nder the revestment doctrine, litigants may revest a trial court with personal and subject matter jurisdiction, after the 30-day period following final judgment, if they actively participate in proceedings that are inconsistent with the merits of the prior judgment." 236 Ill. 2d at 10, 923 N.E.2d at 249.

In *People v. Flowers*, 208 Ill. 2d 291, 802 N.E.2d 1174 (2003), this court clearly stated that "[t]he jurisdiction of trial courts to reconsider and modify their judgments is not indefinite," and held that a trial court normally loses jurisdiction to vacate or modify its judgment 30 days after entry of that judgment, unless a timely postjudgment motion is filed. *Flowers*, 208 Ill. 2d at 303, 802 N.E.2d 1174. We further held that "[l]ack of subject matter jurisdiction is not subject to waiver [citation] and cannot be cured through consent of the parties [citation]." *Flowers*, 208 Ill. 2d at 303, 802 N.E.2d 1174. Although we were not called upon to directly address the continued vitality of the revestment doctrine in *Flowers*, the unequivocal

language in that opinion has caused our appellate court to question whether the revestment doctrine remains valid. See *People v. Price*, 364 Ill. App. 3d 543, 546-47, 846 N.E.2d 1003 (2006) (although leaving open the question of whether the revestment doctrine survived *Flowers*, the court noted that *Flowers* was "consistent with the maxim that a party may not waive an objection to subject matter jurisdiction").

Although the majority in its opinion summarily holds that the revestment doctrine bestowed upon the parties and the circuit court the authority to wipe away Johnson's prior double murder convictions 13 years after their entry and allow him to plead guilty to one count of murder and a reduced sentence, I note that my colleagues cite to the appellate court decision in *People v. Minniti*, 373 Ill. App. 3d 55, 867 N.E.2d 1237 (2007), for direct support of this holding. The *Minniti* decision itself discusses the uncertainty within the appellate court regarding the continued vitality of the revestment doctrine subsequent to our decision in *Flowers*. *Minniti*, 373 Ill. App. 3d at 65-66, 867 N.E.2d 1237. Ultimately, after examining the history and purposes of the revestment doctrine, *Minniti* concludes that "the revestment doctrine remains intact" after *Flowers*. *Minniti*, 373 Ill. App. 3d at 66, 867 N.E.2d 1237.

It is curious that the majority relies upon the appellate court's decision in *Minniti* for direct support of its application of the revestment doctrine in the instant appeal. As stated, *Minniti* struggled to interpret the impact of our decision in *Flowers* upon the continued vitality of the revestment doctrine, and concluded, based upon a review of our prior case law,

that the doctrine of revestment could be reconciled with *Flowers*. It is my position that it is the duty of this court to reconcile its own decisions, and that we should speak directly to the bench and bar as to the reasoning for doing so, and not indirectly through citation to an appellate court decision which attempts to divine the intent of this court. The majority's one-sentence statement regarding the revestment doctrine, and its citation to this appellate court decision in support of its holding, does nothing to reconcile the language in *Flowers*—which is contrary to the revestment doctrine—and also does not answer the fundamental question raised by defendant in the matter before us as to the authority of the State and the circuit court to nullify a jury verdict entered over a decade ago. Finally, I note that even if there were no question concerning the vitality of the revestment doctrine, there remains a question as to whether it applies under the unique facts of this case. In *Minniti*—the case cited by the majority in support of its holding—the revestment doctrine was applied to revest the circuit court with jurisdiction to hear a postjudgment motion which was untimely by *eight days*. *Minniti*, 373 Ill. App. 3d at 64, 867 N.E.2d 1237. Here, the majority revests the circuit court with jurisdiction *13 years* after entry of Johnson's conviction. I question whether the purposes and principles underlying the revestment doctrine may be stretched that far.

After determining that defendant does not have standing to challenge the plea agreement between the State and Johnson, the majority further holds that *even if* he did have standing, defendant's arguments would fail. Defendant contends that his right to due

process and a fair trial includes the right to be tried on competent evidence. Although the majority acknowledges that "accomplice testimony by its nature is fraught with serious weaknesses" (236 Ill. 2d at 16, 923 N.E.2d at 252-53), it dismisses defendant's assertion that the testimony offered by Johnson against him is especially suspect because Johnson's plea agreement with the State required that his testimony be consistent with certain of his prior statements, statements which Johnson had, in fact, previously contradicted under oath. Specifically, after his arrest in 1989, Johnson had initially provided statements to law enforcement officers in which he denied any involvement in the crime. Subsequently, however, Johnson provided an inculpatory statement which also implicated defendant. Before his trial, Johnson again changed his position and filed a motion to suppress his inculpatory statement, and testified under oath that he did not understand the concept of *Miranda* rights, was not given *Miranda* rights, did not provide the information that was contained in his confession, and did not remember making the confession.

Defendant underscores that pursuant to the terms of the plea agreement between the State and Johnson, Johnson's testimony was required to be consistent only with those statements wherein he implicated defendant, despite the fact that Johnson himself testified under oath at his suppression hearing that he did not make those same statements. Defendant further contends that, although the plea agreement required that Johnson's testimony be "truthful," it is difficult to ascertain under the facts presented what exactly the "truth" is. According to defendant, the

State has made the determination that the "truth" equates with the contents of certain prior statements made by Johnson. However, defendant contends, the State thereby improperly places itself in the position of the trier of fact in making that determination. Defendant maintains that the State has no crystal ball to know what the "truth" is—it only knows what statements are consistent.

Defendant further argues that the effect of the plea agreement was to place Johnson under an extremely strong compulsion to testify against defendant in a particular manner in an effort to please the State. Defendant asserts that once he was granted a new trial due to the recantation by the State's key witness at the first trial, the State was desperate to obtain Johnson's testimony, which was the only direct evidence against defendant at the second trial. In order to do so, defendant maintains that the State had to offer Johnson an agreement he would find difficult to refuse. In exchange, Johnson had to testify in such a way that would ensure that defendant would be convicted, or Johnson would himself return to facing life in prison. According to defendant, when a witness is presented with such a situation, the testimony of that witness will, by necessity, conform to what is dictated by the State. Defendant concludes that this amounts to Johnson delivering "scripted" testimony which is inconsistent with the search for the truth and impugns the integrity of the justice system.

The majority fails to squarely address defendant's contentions. Rather, my colleagues examine case law from other jurisdictions and draw support from those decisions for its conclusion that the plea agreement

between the State and Johnson did not violate defendant's rights because even though Johnson agreed that his testimony would be consistent with certain prior statements he had made, it also required that the testimony be "truthful." A closer examination of the cases relied upon by the majority, however, undermines support for its holding, as these decisions upheld plea agreements containing consistency clauses in situations factually distinguishable from the matter at bar.

In *State v. Bolden*, 979 S.W.2d 587 (Tenn. 1998), a codefendant was offered a plea agreement whereby in exchange for his testimony against the defendant, he would receive a reduced sentence. There, the agreement provided:

> "If [the codefendant witness] testifies truthfully as to [defendant's] involvement in the murder of [the victim] and as he stated in his statement to [law enforcement] on 3/21/94 at 6:05 p.m. and as to threats made to him by [defendant] then [the State] will offer a plea to 2d Degree Murder, Range I, judicial sentencing." *Bolden*, 979 S.W.2d at 589.

The court held that because the agreement "hinged upon truthful testimony" *(Bolden*, 979 S.W.2d at 592), it did not require that the witness testify in accordance with a particular script.

Similarly, in *People v. Jones*, 600 N.W.2d 652 (Mich. Ct. App. 1999), witnesses against the defendant were granted "use" immunity in exchange for their testimony against him. There, the agreements provided:

> "IN THE MATTER OF [Witness], that if [Witness] provides a truthful statement to the Detroit Police Department concerning his knowledge of the killing of [the victim] and testifies truthfully in all trials, proceedings and hearings in connection with that killing the Wayne County Prosecutor's Office will not use [Witness'] testimony to bring charges against him." *Jones*, 600 N.W.2d at 654.

The court upheld the agreement, noting that although the immunity agreements provided "some incentive" for the witnesses to conform their testimony at trial to their prior accounts, it was "not persuaded that the agreements rendered the witnesses' testimony so tainted as to be inadmissible." *Jones*, 600 N.W.2d at 657.

In the instant appeal, Johnson had been incarcerated for over a decade for double murder when he was approached by the State with a plea agreement encouraging him to testify against defendant; no similar fact pattern exists in either *Bolden* or *Jones*. Further, in both *Bolden* and *Jones*, the terms of the plea agreements differ in significant respect from that in the matter at bar, as neither contained a provision such as here which required that the witness must not only testify "truthfully," *but also* that his testimony "*shall*" be consistent with certain of his prior statements. Further, there is no indication in either of these cases that the witnesses had a history of inconsistent statements under oath, as does Johnson. Finally, it does not appear that the witnesses in those cases received the extent of benefits offered to Johnson in exchange for his testimony, including the

nullification of a jury verdict and the erasing of a conviction, reduction in sentence, and a transfer from a super-maximum security facility to a lower-security facility. Because the cases relied upon by the majority are factually distinguishable, I do not find them supportive of its holding that the plea agreement here was unobjectionable and that such agreements should be condoned in the future under Illinois law.

For the foregoing reasons, I cannot join the majority's opinion.

Justices KILBRIDE and BURKE join in this dissent.

APPENDIX B

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT, SECOND DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

JAMES BANNISTER,
Defendant-Appellant.

No. 1-04-2894
Dec. 4, 2007

[OPINION]

Justice HOFFMAN delivered the opinion of the court:

Following a jury trial in 1991, the defendant, James Bannister, was convicted of two counts of first degree murder and sentenced to natural life imprisonment. His convictions and sentence were affirmed on direct review. *People v. Young*, 263 Ill. App. 3d 627, 635 N.E.2d 473 (1994). He subsequently sought relief under the Post-Conviction Hearing Act (725 Ill. Comp. Stat. Ann. 5/122-1 *et seq.* (West 1992)), asserting, *inter alia*, actual innocence premised on newly discovered evidence of the recantation of trial testimony against him. The defendant's postconviction petition initially was dismissed without an evidentiary hearing on this question. On appeal, this court reversed and remanded for an evidentiary hearing on the recantation issue. See *People v. Bannister*, No. 1-97-2876, 299 Ill. App. 3d 1119, 740 N.E.2d 95 (1998) (unpublished order under Supreme Court Rule 23). Following the evidentiary hearing, the trial court

granted the defendant's request for postconviction relief, vacated his convictions, and ordered a new trial. The defendant was retried in a bench trial in 2004 and again found guilty of two counts of first degree murder and sentenced to natural life in prison.

On appeal, the defendant challenges his convictions, asserting that (1) his retrial violated his right to be free from double jeopardy, (2) he was denied due process and deprived of a fair trial based upon the plea agreement entered into between the prosecution and co-defendant Michael Johnson, (3) by entering into the plea agreement with Johnson, the State usurped the Governor's exclusive right to pardon or commute sentences, (4) the trial court erred in allowing the State to prosecute him under an indictment that allegedly had been obtained through the use of perjured testimony, (5) the trial court erred in permitting the State to call Deanda Wilson as a witness where Wilson's prior inconsistent testimony had been found to be untruthful, (6) he was deprived of due process and a fair trial by cumulative error, and (7) the State failed to prove his guilt beyond a reasonable doubt. For the following reasons, we affirm the defendant's conviction and sentence.

To resolve the issues raised on appeal, it is necessary to consider the facts and procedural history of the defendant's prior prosecution. The defendant was charged with the November 9, 1989, murders of Dan Williams and Thomas Kaufman in gang-related shootings near the Stateway Gardens housing complex. Also charged with the murders were co-defendants, James Young, Michael Meyers, Kevin Young, Thomas Carter, Eric Smith, and Michael

Johnson. The defendants were tried jointly by a jury, with the exception of Michael Johnson, who was granted a severance and tried separately. The evidence presented at the consolidated trials of the defendant and other co-defendants is summarized as follows.

The shootings originated from the ground and first-floor porches of the building at 3517-3519 South Federal Street. The shooters chased Williams toward an Illinois Institute of Technology (IIT) research building across the street, where he stumbled to the ground. Both Williams and Kaufman, a security guard stationed inside the doors of the IIT building, were killed by the gunfire. The State presented evidence in support of its theory that Williams had been shot, in a case of mistaken identity, to avenge the sexual assault of co-defendant Kevin Young's girlfriend by members of a rival street gang, one of whom was also named "Williams."

At the joint trial of the six co-defendants, the only direct evidence against the defendant was the testimony of Deanda Wilson, who was then 12 years old and a member of the Del Vikings street gang. Wilson testified that, on the night of the shooting, he was with Willie Sims on the first-floor porch of 3519 South Federal Street when he saw the defendant and the six co-defendants, all of whom were dressed in black, approach the building. The seven individuals were all members of the Gangster Disciples street gang, a rival of the Del Vikings gang.

According to Wilson, the defendant and co-defendant Eric Smith arrived at the building first and waited near a janitor's closet under the building, at

one point passing within 10 feet of him. Wilson and Sims then went to the second-floor porch where Wilson saw three co-defendants standing below him in front of the building and two co-defendants standing on the first-floor porch of a connected building. Williams was near a play lot in front of the building when someone called out to him. Following a verbal exchange, all seven men, including the defendant, stepped out from their positions and fired at Williams, who stumbled toward the IIT building and fell between its doors. Wilson was cross-examined regarding certain alleged inconsistencies in his testimony, such as whether the shooters were wearing masks over their faces and whether he could actually see the defendant and Smith from his vantage point.

Several other witnesses corroborated certain aspects of Wilson's testimony, including his version of how Williams was chased and shot by several men before he fell near the doors of the IIT building and Wilson's description of the shooters' dark clothing and the manner in which they left the scene. In addition, Denise Brady and Ruth Wilson, Deanda's mother, corroborated Wilson's identification of co-defendants Kevin Young and Thomas Carter.

The defendant presented an alibi defense, calling four witnesses who testified that he was at home at the time of the shooting. At the conclusion of the trial, the jury found the defendant guilty of two counts of first degree murder, and he was sentenced to life imprisonment. The defendant's convictions and sentence were affirmed on direct appeal. *Young*, 263 Ill. App. 3d at 627, 635 N.E.2d 473.

In April 1993, the defendant filed a *pro se* petition for postconviction relief in which he requested a new trial, and a supplemental petition was filed by counsel in July 1995. The supplemental petition raised several issues, including actual innocence based on newly discovered evidence of Wilson's recantation of his trial testimony implicating the defendant. The postconviction petition was supported by the affidavit of Wilson, who attested that he was 15 years old and a member of the Gangster Disciples. In his affidavit, Wilson recanted his trial testimony in which he identified the defendant as one of the shooters he saw on November 9, 1989. Wilson also gave a court-reported statement in which he stated that he had seen seven people involved in the shooting but could positively identify only four. According to Wilson's statement, although he had identified seven shooters at the co-defendants' joint trial, he was not certain about the identity of three of those people, including the defendant. He did see two people standing under the building, as he had testified at trial, but he was unable to identify them because they were wearing masks. Wilson further attested that when he went to the police station, a detective showed him pictures of seven men, and those were the people he said were involved in the shooting. Wilson claimed that before he testified at trial, he told both a detective and an assistant state's attorney that he was not certain about the identity of all seven of the shooters.

The court initially dismissed the petition without conducting an evidentiary hearing on the issue of Wilson's recantation. In so ruling, the court found that the recantation was unreliable and untrustworthy. The court particularly noted that, since trial, Wilson

had switched allegiance to the Gangster Disciples, the street gang to which the defendant belonged. In denying the defendant's request for postconviction relief based on ineffective assistance of counsel, the trial judge remarked, "as I look back, I believe I would have found [the defendant] not guilty in a bench trial * * * [the] [j]ury thought otherwise * * * I don't think [defense counsel's decision not to call two witnesses] amounts to incompetence."

In denying the defendant's motion to reconsider the dismissal of his postconviction petition, the trial judge stated,

> "I repeat this is a difficult situation for me because it's one of the few times in 20 years I ever disagreed with a jury's verdict on a particular defendant * * * had it been a bench trial[,] I would have found [the defendant] not guilty, given the identification and his alibi. But it was for the jury to decide. They could have reasonably found him guilty, * * * there is nothing under the law * * * that would require me to change the result brought about by the jury."

On appeal from the dismissal of the defendant's postconviction petition, this court reversed and remanded, holding that the circuit court should have conducted an evidentiary hearing on the question of Wilson's recantation of his trial testimony implicating the defendant.

On remand, the circuit court conducted an evidentiary hearing and found that, with respect to the defendant and co-defendant Smith, Wilson's trial testimony was not accurate and truthful and that

there was no corroboration for his implication of the defendant and Smith in the shooting. The court concluded that, as to the defendant and co-defendant Smith, the outcome of the trial "would probably have been different if not for Wilson's perjured testimony." Accordingly, the court granted the defendant's postconviction petition requesting a new trial, vacated his convictions and sentence, set bond, and remanded the defendant to the custody of the Cook County Sheriff pending retrial. The defendant subsequently filed multiple discovery requests and demands for trial. The defendant was retried by the court after waiving his right to a jury.

In the second trial, the State presented the testimony of co-defendant Johnson, who had been tried separately, convicted of both murders, and sentenced to natural life imprisonment. Johnson acknowledged that he had consented to testify against the defendant as part of a plea agreement with the State. Under the terms of the plea agreement, Johnson promised to testify truthfully in exchange for the State's promise to move for vacatur of his two murder convictions and sentence, accept a guilty plea on one count of murder, *nolle prosequi* the other murder charge, and recommend that the court impose a sentence of 60 years' imprisonment on the single murder conviction. The plea agreement also provided that Johnson promised to testify in a manner that was consistent with his prior statements to police and to prosecutors, but the agreement would be rendered null and void if any of the representations contained in Johnson's prior statements, upon which the agreement was predicated, were found to be false. The agreement, which was signed by Johnson, his attorney, and two

assistant state's attorneys, also provided that it was subject to the approval of the trial court judge. In addition, Johnson testified that he had asked to be transferred from the super maximum security facility in which he had been incarcerated and that the State had promised to request a transfer to a different penitentiary, but Johnson understood that decision was completely within the discretion of the Illinois Department of Corrections.

Johnson further testified that in 1989, he had been a member of the Gangster Disciples street gang for approximately 10 years. On the evening of November 9, 1989, he was walking through the Stateway Gardens housing complex with James Young and Michael Meyers when they met the defendant, Eric Smith, Thomas Carter, and Kevin Young near the building at 3651 South Federal Street. All seven men went upstairs to apartment 309, which was the home of Tiya Young, Kevin Young's niece. There, they talked for about an hour, discussing a plan to shoot members of the Del Vikings street gang in revenge for the previous sexual assault of A.W., who was Kevin Young's girlfriend.

After this discussion, the group left the apartment and went to 3618 South Federal Street. At that time, all seven men were armed with guns. Johnson testified that he had a .25-caliber automatic, and the defendant had a .357-caliber revolver. When the group arrived at the second building, they encountered a man known as "Rick James," who greeted the defendant by his nickname. Kevin Young shot at "Rick James," and then all seven men ran to the building at 3547-3549 South Federal Street, where they waited for about 20

minutes before returning to Tiya Young's apartment. There, the group talked and smoked for 45 to 60 minutes.

After leaving Tiya Young's apartment, the group walked to 3617 South Federal Street and encountered Daniel Nicholson, who was in a wheelchair. Johnson stated he stood on the first-floor porch with Carter and the defendant while Kevin Young, Smith, Meyers, and James Young followed Nicholson into the hallway. All seven men had their guns out while Kevin Young robbed Nicholson of some gold chains and other items. After robbing Nicholson, the group walked north to the building at 3547-3549 South Federal Street. Johnson testified that he then told the others that he was going upstairs to his apartment to get a ski mask and some "wave" caps, which are like scarves. After retrieving the ski mask and caps, he rejoined the others, gave caps to Kevin Young and Carter, and kept a ski mask for himself.

Thereafter, the seven men walked together to the building located at 3517-3519 South Federal Street. According to Johnson, he and Meyers walked to the side of the building near the back hallway. Smith, Kevin Young, and Carter stood in the breezeway behind an area referred to as the "mailbox." The defendant and James Young stood on the 3519 side of the building. Johnson stated that, at that time, he was wearing a ski mask, and Meyers was wearing a "wave" cap. As he and Meyers walked through the back hallway, they met Gregory Gordon, Willie Sims, and two women who were standing near the elevators. They also saw Denise Brady, Antoinette Barry, and Joe Johnson, who were coming out of the stairway.

Johnson testified that he then heard Smith say, "come here, mother * * *." After hearing gunshots, he walked with Meyers to the front of the building to see what was happening. Johnson stated that he saw Williams running while the defendant, Smith, Carter, Kevin Young, and James Young were firing their guns at him. Kevin Young stood behind the "mailbox," just inside the breeze way, with Smith and Carter. The defendant and James Young were on the ramp from the 3519 side of the building. The defendant, James Young, Kevin Young, Smith, and Carter stepped out from underneath the building while shooting at Williams. Johnson testified that he shot at Williams as he ran to a play lot, jumped the fence, and ran toward the IIT building.

According to Johnson, when the shooting eventually stopped, he picked up a .25-caliber automatic shell casing from his gun and put it in his pocket. All seven of the shooters then went to an apartment in the building at 3547 South Federal Street and waited a few minutes until the police left the area. Johnson stated that he then went with Meyers, James Young, Kevin Young, Carter, and the defendant to an apartment in another building, but Smith drove away in a car. After about five minutes, the remaining members of the group left the apartment, and he went to the home of his aunt. About a week later, he sold the gun that he had used in the shooting.

Johnson's testimony was substantially consistent with the statement he gave the police on December 29, 1989, the day after his arrest. Johnson acknowledged that he initially denied any involvement in the

shootings and, prior to his 1991 trial, he had moved to suppress his statement, asserting that he had not been advised of his constitutional rights before being questioned. At the retrial of the defendant, Johnson testified that the basis for his motion to suppress had been untrue because he had been advised of his rights prior to giving the statement. The defendant cross-examined Johnson as to the specific terms of the plea agreement and his motivation for entering into the agreement.

Daniel Nicholson testified that he had been confined to a wheelchair since 1981 and, on November 9, 1989, he was visiting his sister who lived in Stateway Gardens. Between 9 and 10 p.m., he left his sister's apartment and went to visit A.W. at 3617 South Federal Street. While waiting outside, he saw Kevin Young, Carter, James Young, Smith, Meyers, Johnson, and the defendant. All seven men pulled guns, and Kevin Young and Meyers robbed him of three gold chains, a watch, and two diamond rings. Afterward, Smith told him to just roll down the ramp and not look back. Nicholson stated that, as he was leaving, he saw Williams and told him that he had just been robbed and that Williams should go to the front of the building. Despite his warning, Williams walked to the back of the building. As he was going up the ramp of his sister's building, he heard someone say, "[c]atch that mother * * *." Looking backward, he saw that Williams was running from several people who were chasing him. He also heard several gunshots and saw flashes of gunfire.

Gregory Gordon testified that in November of 1989, he lived in Stateway Gardens at 3517-3519

South Federal Street. Between 9 and 10 p.m. on November 9, 1989, he was with a person known as "Big Will." As the two men stood near the ground-floor elevators on the 3517 side of the building, they saw seven men, all of whom were dressed in dark clothing, walk into the hallway of the building. Some of the men had bandanas or scarves over their faces. Gordon stated that he recognized Meyers, Johnson, Carter, Smith, and Kevin Young, all of whom were holding guns in their hands. While he pressed the elevator button, he heard someone say, "[c]ome here, mother * * *," and several gunshots. When the elevator doors opened, he got inside along with "Big Will," two girls, and another guy. In the elevator, he heard another volley of gunshots before he got off on the 10th floor. According to Gordon, he then walked to the edge of the porch and looked down, where he saw someone crawling on the ground near the IIT building. He then looked over the porch on the other side of the building and saw seven men walking in a line toward the building at 3547-3549 South Federal Street. Gordon testified that he subsequently viewed police photographs and identified Kevin Young, Smith, Carter, Meyers, and Johnson as five of the seven men he had seen on the night of the shootings. He also identified photographs of the defendant and James Young as people he recognized from the neighborhood, but he was unable to state specifically that they were members of that group.

Gordon acknowledged that on August 29, 1990, he signed a statement exonerating Smith, but he explained that he was coerced into doing so. Gordon testified that he feared for his life and was forced to give that statement by Demetrius Jackson, who had a

gun and whom he believed was a member of the Gangster Disciples.

The State also called Deanda Wilson, who was then serving a sentence for murder in a Minnesota prison. Wilson denied seeing the shootings of Williams and Kaufman at all. Wilson stated that he was at a completely different building and knew nothing of the murders until he heard gunshots. Wilson testified that he looked out of a window after the shooting was all over, and he did not see any of the shooters. The prosecution introduced Wilson's prior inconsistent statements made during his testimony at the defendant's first trial, Johnson's trial, and during the proceedings before the grand jury. Wilson admitted that he had previously testified that the defendant was present at the scene and shot at Williams, but stated that those statements were untrue.

As in his first trial, the defendant again presented an alibi defense and called several witnesses who testified that he was at home on the night of the shootings. Upon consideration of all of the evidence presented, the court found the defendant guilty on both counts of first degree murder. The defendant subsequently filed post-trial motions for a new trial and for acquittal and dismissal based on double-jeopardy violations. The court denied these motions and sentenced the defendant to natural life in prison. The defendant has appealed his convictions and sentence.

We initially address the defendant's argument that his retrial violated his constitutional guarantees against double jeopardy. The State responds that the defendant has forfeited this issue on review by failing

to timely raise it in the trial court and by requesting that the court grant him a new trial following postconviction relief. The State also asserts that, even if this issue had been preserved for review, retrial of the defendant was proper. We agree with the State on both propositions.

The United States and Illinois constitutions provide that no person shall be twice put in jeopardy for the same offense. U.S. Const. amend. V; Ill. Const. art. I, § 10. The constitutional guarantee against double jeopardy forbids a second, or successive, trial for the purpose of affording the prosecution another opportunity to supply evidence it failed to muster in the first proceeding. *People v. Olivera*, 164 Ill. 2d 382, 393, 647 N.E.2d 926 (1995), citing *Burks v. United States*, 437 U.S. 1, 11 (1978). Although the guarantee against double jeopardy precludes the State from retrying a defendant after a reviewing court has determined that the evidence introduced at trial was legally insufficient to convict, the double jeopardy clause does not preclude retrial of a defendant whose conviction has been set aside because of an error in the proceedings leading to the conviction. *Olivera*, 164 Ill. 2d at 393, 647 N.E.2d 926, citing *People v. Mink*, 141 Ill. 2d 163, 173-74, 565 N.E.2d 975 (1990). In addition, retrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted, and, for purposes of double jeopardy, all evidence submitted at the original trial may be considered when determining the sufficiency of the evidence. *Olivera*, 164 Ill. 2d at 393, 647 N.E.2d 926, citing *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988); *People v. Avery*, 180 Ill. App. 3d 146, 157, 534 N.E.2d 1296 (1989).

It is firmly established that the constitutional right to not be twice put in jeopardy for the same offense is a personal privilege which may be forfeited. *People v. Scales*, 18 Ill. 2d 283, 285, 164 N.E.2d 76 (1960); *People v. Dieterman*, 243 Ill. App. 3d 838, 843, 613 N.E.2d 298 (1993). Where a new trial is granted on the defendant's request, that is, in itself, not a bar to a second trial on the same or amended indictment. *People v. Placek*, 184 Ill. 2d 370, 377, 704 N.E.2d 393 (1998). The defendant cannot, by his own conduct, avoid the jeopardy on which he stands and then assert it as a bar to subsequent jeopardy. *Placek*, 184 Ill. 2d at 377, 704 N.E.2d 393. The right has been forfeited where the accused seeks and obtains a new trial, or where he does not raise the defense of former jeopardy before judgment in the trial court. *Scales*, 18 Ill. 2d at 285-86, 164 N.E.2d 76.

In this case, the defendant specifically requested a new trial in his postconviction petitions, and he did not object to the trial court's decision to set bond and hold him for retrial following the grant of postconviction relief. In fact, the record demonstrates that, after his first convictions were vacated, the defendant affirmatively demanded a new trial on more than one occasion. The defendant did not raise his double-jeopardy claim until he filed post-trial motions after the trial court had again entered judgments of conviction on retrial. Thus, he has, by his own conduct, forfeited the issue of double jeopardy on appeal. See *Scales*, 18 Ill. 2d at 285-86, 164 N.E.2d 76.

The defendant seeks to avoid this result by relying on certain remarks made by the circuit court during the postconviction proceedings. He contends that these

comments constituted a finding by the court that the prosecution had failed to present sufficient evidence at the defendant's first trial to support his conviction. We find this contention is refuted by the record.

In particular, the defendant refers to the dismissal of his postconviction petition where the court stated, "as I look back, I believe I would have found [the defendant] not guilty in a bench trial * * * [the] [j]ury thought otherwise * * * I don't think [defense counsel's decision not to call two witnesses] amounts to incompetence." Also, in denying the defendant's motion to reconsider the dismissal of his postconviction petition, the trial judge stated,

> "I repeat this is a difficult situation for me because it's one of the few times in 20 years I ever disagreed with a jury's verdict on a particular defendant * * * had it been a bench trial[,] I would have found [the defendant] not guilty, given the identification and his alibi. But it was for the jury to decide. They could have reasonably found him guilty, * * * there is nothing under the law I feel that would require me to change the result brought about by the jury."

The defendant misconstrues the court's determination and relies on certain isolated remarks, taken out of context, to support his argument that the court found a lack of sufficient evidence to convict at the first trial. Yet, it is clear that the court's comments, considered in their entirety, reflect the opposite conclusion. The trial judge specifically found that, although he might have found the defendant not guilty, the jury thought otherwise, and the

determination of the defendant's guilt was for the jury to decide. In addition, the court found that the jury could have reasonably found the defendant guilty and that there was nothing under the law that would compel a different result. The trial court's remarks demonstrate that the court did not make a factual determination that the prosecution had presented insufficient evidence to support the defendant's guilt at the first trial.

Here, postconviction relief was granted based on Wilson's recantation of his previous testimony and not based on a lack of sufficient evidence to convict. Therefore, retrial was proper, and all the evidence submitted at the original trial may be considered when determining the sufficiency of the evidence. See *Olivera*, 164 Ill. 2d at 393, 647 N.E.2d 926, citing *Lockhart*, 488 U.S. at 40; *Avery*, 180 Ill. App. 3d at 157, 534 N.E.2d 1296. Upon consideration of the evidence adduced at the first trial, including the testimony of Wilson, we agree with the trial court's determination that the prosecution had presented sufficient evidence to support defendant's convictions. Accordingly, the defendant's second prosecution did not violate his right to be free from double jeopardy.

We next consider the defendant's contention that he was deprived of due process and a fair trial based upon the plea agreement entered into between the prosecution and Johnson. In support of this argument, the defendant relies upon the fact that the plea agreement provided that Johnson would testify consistently with his prior statements to police and prosecutors. Whether a defendant's constitutional rights are violated by a consistency provision in a

witness' plea agreement is an issue of first impression in Illinois. However, other states have considered the question and held that consistency provisions are permissible where they are accompanied by terms that require the witness' testimony to be truthful. We find the reasoning of these cases to be instructive here.

In *State v. Bolden*, 979 S.W.2d 587 (Tenn. 1998), the defendant and a co-defendant were charged with first degree murder. *Bolden*, 979 S.W.2d at 589. The co-defendant testified against the defendant pursuant to a plea agreement requiring that he testify truthfully as to the defendant's involvement in the murder, in accordance with a prior statement he had given to a law enforcement officer. *Bolden*, 979 S.W.2d at 589. The defendant appealed his conviction, arguing that he had been denied his right to due process and a fair trial because the co-defendant's plea agreement required him to testify to specific facts. *Bolden*, 979 S.W.2d at 590.

The Supreme Court of Tennessee held that particular testimony of a witness as a condition of a plea agreement is not a violation of due process so long as the testimony is required to be truthful. *Bolden*, 979 S.W.2d at 591-92, citing *State v. Burchett*, 399 N.W.2d 258, 266-67 (Neb. 1986); *State v. Clark*, 743 P.2d 822, 828-29 (Wash. Ct. App. 1987); *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197, 200-01 (Nev. 1991). The court observed that "'it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require . . . preclusion.'" *Bolden*, 979 S.W.2d at 591, quoting *Burchett*, 399 N.W.2d at 266-67. The court distinguished on their

facts cases in which the plea agreement required only that the witness testify in a particular fashion or that the testimony produce a specific result, without regard to the truthfulness of the testimony. *Bolden*, 979 S.W.2d at 592 n.3, citing *People v. Medina*, 116 Cal. Rptr. 133, 141 (Ct. App. 1974); *People v. Green*, 228 P.2d 867, 868-72 (Cal. Ct. App. 1951).

The *Bolden* court noted that because the plea agreement specifically required the co-defendant to testify truthfully, that condition "necessarily engulfed" the other terms in the agreement, which was "hinged upon truthful testimony." *Bolden*, 979 S.W.2d at 592. The court held that the codefendant's testimony did not violate the defendant's rights to due process and a fair trial even though it had been induced by a plea agreement that required truthfulness and consistency with a prior statement. *Bolden*, 979 S.W.2d at 593.

The Court of Appeals of Michigan reached the same result in *People v. Jones*, 600 N.W.2d 652 (Mich. Ct. App. 1999), where it upheld immunity agreements that provided that the witnesses had previously given truthful statements to police concerning the murder with which the defendant was charged and would testify truthfully at trial. *Jones*, 600 N.W.2d at 656-57. The court observed that although the immunity agreements may provide some incentive for the witnesses to conform their trial testimony to their prior accounts of the incident, they did not violate the defendant's rights where the prosecution expressly conditioned its grants of immunity on the promises that the witnesses would provide truthful testimony. *Jones*, 600 N.W.2d at 657. The *Jones* court concluded that when a prosecutor makes the decision to bargain

with a witness on the basis of representations made by the witness during negotiations with the State, it is reasonable for the prosecutor to rely on the witness' assertion that such representations are truthful and to expect that the witness' trial testimony would be essentially consistent with the original information upon which the State's promise of leniency was induced. *Jones*, 600 N.W.2d at 657, citing *Acuna*, 819 P.2d at 199. In *Arizona v. Rivera*, 109 P.3d 83 (Ariz. 2005), two accomplices testified against the defendant pursuant to separate plea agreements providing that each accomplice avowed that the information she had provided during a pretrial interview with prosecutors was a complete, accurate, and truthful account of the events surrounding the murder. *Rivera*, 109 P.3d at 84. In addition, each plea agreement provided that the accomplice understood and acknowledged that the State had entered into the plea agreement based on that avowal, and that the accomplice promised that she would testify truthfully at the defendant's trial. *Rivera*, 109 P.3d at 84. The Supreme Court of Arizona concluded that the defendant's rights were adequately protected because the plea agreements did not compel the accomplices to disregard their oaths of truthfulness or bind them to a particular script or result. *Rivera*, 109 P.3d at 86-87. In so holding, the *Rivera* court found that *State v. Fisher*, 859 P.2d 179, 183 (Ariz. 1993) was factually distinguishable because the plea agreement in that case required only that the witness testify in a manner that was consistent with a prior statement regardless of the truth of that statement. *Rivera*, 109 P.3d at 87, citing *Fisher*, 859 P.2d at 183.

Here, the plea agreement repeatedly and explicitly obligated Johnson to testify truthfully. The agreement also provided that Johnson would testify in a manner that was consistent with his prior statements to police and to prosecutors, but if any of the representations contained in his prior statements were found to be false, the agreement would be rendered null and void. Thus, truthfulness was the overriding requirement of the agreement, and any falsehoods in Johnson's prior statements would nullify the accord. The agreement neither compelled Johnson to disregard his oath of truthfulness nor bound him to a particular script or result. By its terms, the requirement of truthfulness "necessarily engulfed" the other provisions in the agreement, which was "hinged upon [Johnson's] truthful testimony." See *Bolden*, 979 S.W.2d at 592. Accordingly, we find that Johnson's testimony was not tainted by the plea agreement, and the admission of his testimony, induced by the plea agreement, did not violate the defendant's rights to due process and a fair trial.

In addition, the defendant claims that he was denied due process where the trial judge participated in Johnson's plea agreement and failed to recuse himself from presiding over the defendant's second trial. We find that this contention is not supported by the record. Contrary to the defendant's assertion, the trial judge did not sign and was not a party to Johnson's plea agreement. In addition, the court did not approve Johnson's plea agreement until more than a month after the defendant's second trial had concluded and he had again been found guilty. In light of these facts, we find that the defendant's claim that

the trial judge committed reversible error by failing to recuse himself is unfounded.

We also reject the defendant's assertion that the State's plea agreement with Johnson "usurped the sole right to pardon or commute sentences allocated to the Governor of Illinois." Initially, we observe that the defendant lacks standing to challenge the validity and enforceability of Johnson's plea agreement because he was not a party to it.

It is established that fully negotiated plea agreements, though part of the criminal justice structure, are generally governed by contract law principles. *People v. Evans*, 174 Ill. 2d 320, 332, 673 N.E.2d 244 (1996); *People v. Malin*, 359 Ill. App. 3d 257, 262, 833 N.E.2d 440 (2005). Under contract law, there is a strong presumption against creating contractual rights in third parties, and this presumption can only be overcome by a showing that the language and circumstances of the contract manifest an affirmative intent by the parties to benefit the third party. *Estate of Willis v. Kiferbaum Construction Corp.*, 357 Ill. App. 3d 1002, 1007, 830 N.E.2d 636 (2005), citing *Bates & Rogers Construction Corp. v. Greeley & Hansen*, 109 Ill. 2d 225, 486 N.E.2d 902 (1985). Here, the defendant was not a beneficiary of the plea agreement between Johnson and the State. As a result, he has no standing to contest the validity or enforcement of Johnson's plea agreement.

Moreover, even if the defendant had standing to assert this claim, it is clear that the plea agreement entered into between Johnson and the State was neither a pardon nor a commutation of sentence. A pardon is an executive action that officially nullifies

punishment or other legal consequences of a crime. Black's Law Dictionary 1137 (7th ed. 1999). A commutation of a sentence is the executive's substitution of a punishment that is less severe than that originally imposed on a criminal defendant. Black's Law Dictionary 274 (7th ed. 1999). Neither of these situations requires the convicted defendant to undertake any promise or obligation in order to receive the benefit. By contrast, the agreement between Johnson and the State was a negotiated accord that obligated both the prosecution and Johnson to take certain actions in order to satisfy its terms.

The supreme court has recognized that "[t]here is no question that 'the disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice.'" *People v. Henderson*, 211 Ill. 2d 90, 102, 809 N.E.2d 1224 (2004), quoting *Santobello v. New York*, 404 U.S. 257, 260 (1971). In addition, the court has held that "the plea-bargaining process, and the negotiated plea agreements that result from that process, are 'vital to and highly desirable for our criminal justice system.'" *Henderson*, 211 Ill. 2d at 102-03, 809 N.E.2d 1224, quoting *People v. Evans*, 174 Ill. 2d 320, 325, 673 N.E.2d 244 (1996).

In this case, the plea agreement required Johnson to testify truthfully against the defendant, withdraw all of his appeals and postconviction petitions, and forever waive any and all future appeals, postconviction petitions or motions to vacate pleas. The record demonstrates that Johnson had an amended supplemental postconviction petition

pending in January 2004, and he moved to voluntarily dismiss his postconviction appeal in accordance with the terms of the plea agreement. In exchange for Johnson's truthful testimony and his promise to forego future appeals and postconviction petitions, the State promised to move to vacate Johnson's existing sentence, accept his guilty plea on one count of first degree murder, move to *nolle prosequi* the other murder charge, and to recommend that Johnson receive a sentence of 60 years in prison, which was the maximum sentence for first degree murder. These mutual obligations demonstrate that the plea agreement between Johnson and the State cannot be construed as a pardon or a commutation of sentence.

Our analysis is not altered by the fact that Johnson had already been tried and convicted. Illinois courts have consistently held that a defendant does not have an absolute right to have a guilty plea accepted by the circuit court, and the court may reject a plea in the exercise of sound judicial discretion. *Henderson*, 211 Ill. 2d at 103, 809 N.E.2d 1224, citing *Santobello*, 404 U.S. at 262; *People v. Peterson*, 311 Ill. App. 3d 38, 45, 725 N.E.2d 1 (1999). Before a trial judge accepts any plea, the judge must first determine if the plea has a factual basis, which protects those accused of crime "by ensuring that they have not pleaded guilty by mistake or under a misapprehension, or been coerced or improperly advised to plead to crimes they did not commit." *People ex rel. Daley v. Suria*, 112 Ill. 2d 26, 32, 490 N.E.2d 1288 (1986). Here, the trial court found a factual basis for the guilty plea after having presided over Johnson's earlier trial and having heard Johnson's testimony at the defendant's retrial, which recounted his participation in the

murder of Williams, and the court did not accept Johnson's guilty plea until more than a month after the defendant was found guilty on retrial. Also, as noted above, Johnson voluntarily dismissed a pending appeal on a postconviction petition pursuant to the plea agreement. Under these circumstances, we find that the plea agreement was valid and enforceable.

In addition, even if the plea agreement were found to be invalid, the only consequence would be that it could not have been enforced by either the State or Johnson. The defendant has cited no authority holding that a determination that the plea agreement was invalid would have required the suppression of Johnson's testimony. Rather, a finding that the agreement was void would mean that neither Johnson nor the State would have been obligated to fulfill their respective commitments under the agreement, and Johnson would still be legally convicted of two murders. See *People v. Caban*, 318 Ill. App. 3d 1082, 1087-89, 743 N.E.2d 600 (2001) (holding that, where the sentence stipulated in the plea agreement was not authorized by statute, the entire agreement was void, and the defendant's plea was properly vacated). For all of the reasons set forth above, we reject the defendant's assertion that Johnson's plea agreement was invalid.

The defendant next claims that it was improper to retry him on the original indictment because that indictment was based on perjured testimony by Wilson. In response, the State contends that the defendant has forfeited this issue on appeal. We agree.

To preserve an issue for review, a defendant must both object at trial and raise the issue in a written

post-trial motion. *People v. Bush*, 214 Ill. 2d 318, 332, 827 N.E.2d 455 (2005); *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988). Here, the defendant did not challenge the indictment prior to or during trial, nor did he raise it in his post-trial motion. Consequently, he has forfeited this claim on appeal. See *Bush*, 214 Ill. 2d at 332, 827 N.E.2d 455; *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d 1124.

Moreover, even if this issue had been preserved for review, the defendant has failed to present this court with an adequate record to support his assertion that the indictment against him was based solely on the grand jury testimony of Wilson. It is established that the appellant has the burden of providing a sufficiently complete record on appeal so that the reviewing court is fully informed regarding the issues to be resolved. *People v. Moore*, 373 Ill. App. 3d 367, 376, 869 N.E.2d 177 (2007); *People v. Raczkowski*, 359 Ill. App. 3d 494, 496, 834 N.E.2d 596 (2005). Where the issue on appeal relates to the conduct of a proceeding, the issue is not subject to review absent a report or record of the proceeding. *Webster v. Hartman*, 195 Ill. 2d 426, 432, 749 N.E.2d 958 (2001); *Raczkowski*, 59 Ill. App. 3d at 496, 834 N.E.2d 596. Because the record before us does not include the entire report of proceedings before the grand jury, it is impossible for this court to ascertain whether the indictment against the defendant was based exclusively on Wilson's testimony.[1] Accordingly, we

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[1] This court granted the defendant's motion to supplement the record on appeal to include the report of proceedings before the grand jury. Although the briefs indicate that Wilson testified before the grand jury, the supplemental record filed by the defendant contains only the testimony of Detective Winstead and

must presume that the trial court did not err in permitting the retrial of the defendant on the original indictment.

The defendant also argues that it was reversible error for the State to call Deanda Wilson as a witness. In particular, the defendant contends that he was denied due process and a fair trial because the court permitted the State to call Wilson despite the recantation of his testimony given at previous trials and before the grand jury. The State again argues that the defendant has forfeited this issue on appeal, and we must agree.

As stated above, in order to preserve an issue for review, a defendant must both object at trial and raise the issue in a written post-trial motion. *Bush*, 214 Ill. 2d at 332, 827 N.E.2d 455; *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d 1124. In this case, the defendant failed to object at trial to the introduction of Wilson's testimony and, therefore, has forfeited this issue on review. See *Bush*, 214 Ill. 2d at 332, 827 N.E.2d 455; *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d 1124.

Despite this forfeiture, the defendant urges us to consider this issue under the plain-error rule, which permits review where the trial evidence was closely balanced or when the error is "so substantial that it affected the fundamental fairness of the proceeding, and remedying the error is necessary to preserve the integrity of the judicial process." *People v. Hall*, 194 Ill. 2d 305, 335, 743 N.E.2d 521 (2000); 134 Ill. 2d R. 615(a). The defendant asserts that plain error was established because the question of whether Wilson's

---

does not include the testimony of Wilson or any other witnesses.

trial testimony was perjured had been finally decided during the postconviction proceedings and had become the law of the case. We disagree.

The law of the case doctrine bars relitigation of an issue already decided in the same case. See *People v. Tenner*, 206 Ill. 2d 381, 395, 794 N.E.2d 238 (2002); *People v. Patterson*, 154 Ill. 2d 414, 468, 610 N.E.2d 16 (1992). The case before us is the defendant's direct appeal of his convictions following the second trial, which is a separate and distinct proceeding from that involving the defendant's post-conviction petition. See *People v. Harris*, 224 Ill. 2d 115, 127, 862 N.E.2d 960 (2007) (recognizing that a postconviction proceeding collaterally attacking a conviction is a case separate and apart from the case in which the conviction was entered). Because the defendant's direct appeal and the postconviction proceedings are not the same case, the doctrine of law of the case does not apply here. See *Tenner*, 206 Ill. 2d at 395-96, 794 N.E.2d 238. In addition, we observe that the defendant has not argued that either collateral estoppel or *res judicata* applied to the question of whether Wilson's testimony had been perjured, and we decline to address the issue since it was not raised on appeal. See 210 Ill. 2d R. 341(h)(7); *People v. Colon*, 225 Ill. 2d 125, 157, 866 N.E.2d 207 (2007).

Moreover, the merits of the defendant's argument have been rejected by *People v. Craig*, 334 Ill. App. 3d 426, 778 N.E.2d 192 (2002). As observed in *Craig*, section 115-10.1 of the Code of Criminal Procedure (725 Ill. Comp. Stat. Ann. 5/115-10.1 (West 2004)) specifically authorizes the admission of prior inconsistent statements as substantive evidence and

dictates that the court did not err in permitting the State to call Wilson as a witness.

Section 115-10.1 provides, in relevant part, as follows:

> "In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement—
>
> (1) was made under oath at a trial, hearing, or other proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
>
> (A) the statement is proved to have been written or signed by the witness, or
>
> (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or
>
> (C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording." 725 Ill. Comp. Stat. Ann. 5/115-10.1 (West 2004); see

also *Craig*, 334 Ill. App. 3d at 441, 778 N.E.2d 192.

Under this provision, prior inconsistent statements are admissible as substantive evidence as long as the statutory requirements have been met. See *People v. Benford*, 349 Ill. App. 3d 721, 730, 812 N.E.2d 714 (2004); *People v. Kluppelberg*, 257 Ill. App. 3d 516, 534, 628 N.E.2d 908 (1993).

In *Craig*, this court recognized that "'a substantive policy reason for section 115-10.1 of the Code was to prevent a turncoat witness from backing away from a former statement made under circumstances indicating it was likely to be true by merely denying the statement.'" *Craig*, 334 Ill. App. 3d at 441-42, 778 N.E.2d 192, quoting *People v. Fauber*, 266 Ill. App. 3d 381, 390-91, 640 N.E.2d 689 (1994). The *Craig* court held that the defendant's due process rights were not violated by the State's introduction as substantive evidence the prior inconsistent statements of two witnesses who recanted their previous testimony at trial. *Craig*, 334 Ill. App. 3d at 441-42, 778 N.E.2d 192.

In this case, each term set forth in section 115-10.1 was satisfied by Wilson's testimony at the previous trials and during the grand jury proceedings. Consequently, the admission of Wilson's prior inconsistent statements as substantive evidence was proper, and we find no violation of the defendant's right to due process by its admission. See *Craig*, 334 Ill. App. 3d at 441-42, 778 N.E.2d 192.

The defendant next contends that his convictions must be reversed based on cumulative error. In support of this contention, he relies upon the plea agreement with Johnson, the admission of Wilson's

prior inconsistent statements as substantive evidence, his retrial based on the original indictment, and the fact that the State offered "incentives" for the testimony of Nicholson and Gordon. We have previously disposed of the first three assignments of error. Regarding the final allegation, we initially observe that the defendant has waived this issue on review by failing to raise it at trial. See *Bush*, 214 Ill. 2d at 332, 827 N.E.2d 455; *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d 1124. In addition, we find that the defendant was not denied due process where his counsel was able to cross-examine both Nicholson and Gordon regarding any inducements or benefits that had been offered by the prosecution in exchange for their testimony. Accordingly, we conclude that the defendant was not deprived of the right to a fair trial based on cumulative error. See *People v. Caffey*, 205 Ill. 2d 52, 117-18, 792 N.E.2d 1163 (2001); *People v. Hall*, 194 Ill. 2d 305, 350-51, 743 N.E.2d 521 (2000).

Finally, we address the defendant's argument that his convictions should be reversed because the State failed to prove him guilty beyond a reasonable doubt. In challenging the evidentiary basis for his convictions, the defendant essentially disputes the credibility of the witnesses who testified against him. Specifically, he claims that his convictions should be reversed where the testimony given by Johnson, Nicholson, and Gordon was improbable and unconvincing because each of these witnesses had received substantial benefits from the State in exchange for their testimony. We disagree.

When a defendant challenges the sufficiency of the evidence, the appellate court must determine

"whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304 (2004). In such a case, it is not the role of the reviewing court to retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178 (2006). A criminal conviction will not be set aside on the grounds of insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Brown*, 169 Ill. 2d 132, 152, 661 N.E.2d 287 (1996). In reviewing the evidence we will not substitute our judgment for that of the trier of fact. *Sutherland*, 223 Ill. 2d at 242, 860 N.E.2d 178; *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262 (2005). The determination of the weight to be given the witnesses' testimony, their credibility, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. *Sutherland*, 223 Ill. 2d at 242, 860 N.E.2d 178.

The testimony of a single witness, is sufficient to convict if the testimony is positive and the witness is credible. *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365 (1999). Where the finding of the defendant's guilt depends on eyewitness testimony, a reviewing court must decide whether a fact finder could reasonably accept the testimony as true beyond a reasonable doubt. *Cunningham*, 212 Ill. 2d at 279, 818 N.E.2d 304. Under this standard, the eyewitness testimony may be found insufficient "only where the record evidence compels the conclusion that no

reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280, 818 N.E.2d 304. Although "the testimony of an accomplice witness has inherent weaknesses and should be accepted only with caution and suspicion," such testimony, "whether corroborated or uncorroborated, is sufficient to sustain a criminal conviction if it convinces the [trier of fact] of the defendant's guilt beyond a reasonable doubt." *People v. Tenney*, 205 Ill. 2d 411, 429, 793 N.E.2d 571 (2002), citing *People v. Smith*, 177 Ill. 2d 53, 74, 685 N.E.2d 880 (1997). Moreover, a conviction will not be reversed simply because the defendant claims that a witness was not credible. *Smith*, 177 Ill. 2d at 74, 685 N.E.2d 880; *People v. Byron*, 164 Ill. 2d 279, 299, 647 N.E.2d 946 (1995).

In this case, the direct evidence against the defendant consisted primarily of the testimony of Johnson, who testified in detail regarding his own involvement and that of the defendant in the murders of Williams and Kaufman. Johnson explained the motivation behind the murder of Williams, who was believed to be a member of the Del Vikings street gang that was responsible for the previous sexual assault of Kevin Young's girlfriend. He also described the series of events that culminated in the two murders. He explicitly related the manner in which the seven co-defendants met on the evening of November 9, 1989, armed themselves with various weapons, traveled between several buildings in the housing complex, and robbed Nicholson before encountering Williams. Johnson testified that after Smith called out to Williams, all seven members of the group shot at him while he attempted to flee toward the IIT building.

Both Williams and Kaufman were killed by these shots.

Johnson's testimony alone was sufficient to sustain the defendant's murder convictions. In addition, several aspects of his testimony were corroborated by the testimony of Nicholson and Gordon. In particular, Nicholson testified that the defendant was armed with a gun and was part of the group of men who robbed him shortly before the shootings occurred. Gordon's testimony corroborated Johnson's description of the events that occurred immediately before the shootings.

As stated earlier, it was the right and obligation of the trial judge to determine the weight and credibility to be given the witnesses' testimony, to resolve any inconsistencies and conflicts in the evidence, and to decide the reasonable inferences to be drawn from the testimony. *Sutherland*, 223 Ill. 2d at 242, 860 N.E.2d 178; *Tenney*, 205 Ill. 2d at 428, 793 N.E.2d 571. The court was well aware of the terms of Johnson's plea agreement and, in accepting the plea, the court specifically found that Johnson's trial testimony was truthful. In addition, the court was informed of the benefits that both Nicholson and Gordon had received in exchange for their testimony. Also, as the finder of fact, the trial court was entitled to credit the testimony of the prosecution witnesses and to disregard the defendant's alibi evidence. See *People v. Jimerson*, 127 Ill. 2d 12, 46, 535 N.E.2d 889 (1989). In reviewing all of the evidence in accord with the standard set forth above, we find that a rational trier of fact could have found the defendant's guilt beyond a reasonable doubt. Accordingly, we reject the defendant's assertion that

the State failed to prove him guilty beyond a reasonable doubt.

For the foregoing reasons, we affirm the defendant's convictions and sentence.

Affirmed.

HALL and KARNEZIS, JJ., concur.

APPENDIX C

SUPREME COURT OF ILLINOIS

Springfield, Illinois, January 25, 2010

THE FOLLOWING CASES ON THE REHEARING DOCKET WERE DISPOSED OF AS INDICATED:

No. 105887 — People State of Illinois, appellee, v. James Bannister, appellant. Appeal, Appellate Court, First District.

Petition for rehearing denied.

* * * * *

APPENDIX D

STATE OF ILLINOIS }
} SS.
COUNTY OF COOK }

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	}	
VS.	}	NO. 90 CR-1823
MICHAEL JOHNSON	}	

PLEA AGREEMENT

IT IS AGREED that Michael Johnson will testify truthfully in all matters regarding the 1st Degree Murders of Dan Williams and Thomas Kaufman, which occurred on November 9, 1989, at approximately 10:00 p.m. at or near 3517-19 S. Federal, Chicago, Cook County, Illinois. Such truthful testimony shall be consistent with Michael Johnson's post-arrest statements in December 28, and December 29, 1989, to Chicago Police officers and Cook County Assistant State's Attorneys and his statements made to Cook County State's Attorney personnel during his pre-plea agreement interviews on April 29 and May 24, 2004.

It is agreed that Michael Johnson will testify truthfully in the case of *People v. James Bannister and Eric Smith*, 90CR-1812 and 90CR-16798. It is further agreed that, if necessary, Michael Johnson will testify truthfully in the cases of *People v. Kevin Young, Thomas Carter, Michael Meyers and James Young*, 89CR-27587 and 90CR-1823.

In exchange for Michael Johnson's truthful testimony in the above matters, it is agreed that Michael Johnson shall withdraw all appeals and post-conviction petitions in his case, 90CR-1823, and forever waive any and all future appeals, post-conviction petitions or motions to vacate pleas. It is further agreed that the parties will move to vacate the existing sentence in Michael Johnson's case, 90CR-1823, and that the case will be placed back on the Honorable Judge James Schreier's trial call. It is agreed that Michael Johnson shall plead guilty to the 1st Degree Murder counts involving Dan Williams, and the state will nolle pros the 1st Degree Murder counts involving Thomas Kaufman. The State will recommend that Judge Schreier re-sentence Michael Johnston to 60 years in the Illinois Department of Corrections ("I.D.O.C."). This agreement is contingent on Judge Schreier's acceptance of its terms in their entirety.

It is further agreed that the State shall place Michael Johnson in the Witness Protection Program Living Unit until his trial testimony in open court is completed. After his testimony is completed, Michael Johnson shall be remanded to the I.D.O.C. The State shall recommend to I.D.O.C. that Michael Johnson be segregated from the above-named co-defendants and

that Michael Johnson be house in a medium-security prison, or, if that's not possible, in the Pontiac Correctional Center.

LIMITATIONS OF PLEA AGREEMENT

The following acts and omissions during the pendency of this agreement by Michael Johnson shall render this agreement null and void, and all violations of criminal law by Michael Johnson will be fully prosecuted by Cook County State's Attorney's Office.

A. Failure of Michael Johnson to honestly and truthfully cooperate with any law enforcement agency or the Cook County State's Attorney's Office.

B. Failure of Michael Johnson to truthfully testify under oath in open court in the above matters.

C. Any arrest of Michael Johnson for violation of any local, state or federal law of any jurisdiction, except for traffic violations punishable by fine only.

D. Acts by Michael Johnson which constitute violations of any criminal law.

E. Illegal use of or ingestion, by any means, of any controlled substances and/or cannabis sativa.

F. Representations made by Michael Johnson during his post-arrest statements and his pre-plea agreement interviews, upon which this agreement was predicated, which are found to be false.

G. This entire agreement is subject to the approval of the Honorable Judge James M. Schreier.

I, Michael Johnson, have read this Plea Agreement and understand its terms, conditions, limitations, and provisions. I am entering into this agreement based on the terms, conditions, limitations, and provisions contained therein, and not based on any other promises, or due to any threats of coercion. There are no understandings or commitments other than those which appear in this written agreement. I understand that this agreement does not constitute immunity, and my failure to abide by the terms, conditions, provisions, and limitations of the agreement will result in my prosecution. I further understand that if the conditions are satisfied, Cook County State's Attorneys Office (C.C.S.A.O.) will recommend a sentence of 60 years in the Illinois Department of Corrections (I.D.O.C.) to the trial court. I understand that the determination as to whether the conditions set forth have been satisfied will be made by the C.C.S.A.O. in its sole discretion and I agree to waive judicial review of that determination.

DATE: 6-2-04 [Signed]
Michael Johnson

DATE: 6-2-04 [Signed]
Attorney for Michael Johnson

DATE: 6-2-04 [Signed]
Assistant State's Attorney

DATE: 6-2-04 [Signed]
Assistant State's Attorney

APPENDIX E

RE: INVESTIGATION (Shootings of Dan Williams and Thomas Kaufman.)

STATEMENT
OF
MICHAEL JOHNSON,

taken in an interview room at Area 1 Violent Crimes Headquarters, Chicago Police Department, 5101 South Wentworth, Chicago, Cook County, Illinois, on Friday, the 29th day of December, 1989, at approximately 10:25 p.m.

PRESENT: Ms. Laura Lambur
Assistant State's Attorney

Det. Edward Winstead
Area 1 Violent Crimes
Star No. 15926

Reported by: R.F. Peters
Book No. 1229-89

MS. LAMBUR: Let the record reflect that we are in an interview room at Area 1 Violent Crimes. Today's date is Friday, December 29, 1989. The time is approximately 10:25 p.m. Present in the room with me, Assistant State's Attorney Laura Lambur, are Detective Edward Winstead, Star No. 15926, the court reporter, and Michael Johnson.

We are here to take the statement of Michael Johnson concerning the investigation of the shootings of Dan Williams and Thomas Kaufman, which occurred on November 9, 1989, at approximately 10:05 p.m., at 3519 South Federal.

Michael, I talked to you earlier and explained that I am an assistant state's attorney, a lawyer working with the police and not your lawyer, is that correct?

MR. JOHNSON: Yes.

Q. And before we spoke, I advised you of your constitutional rights, is that correct?

A. Yes.

Q. Michael, I am going to advise you of your rights again.

Do you understand that you have the right to remain silent?

A. Yes.

Q. Do you understand that anything you say can be used against you in a court of law?

A. Yes.

Q. Do you understand you have the right to talk to a lawyer and have him present with you while you are being questioned?

A. Yes.

Q. Do you understand if you cannot afford to hire a lawyer, one will be appointed by the Court to represent you before any questioning if you wish one?

A. Yes.

Q. Michael, understanding these rights, do you wish to talk to us now?

A. Yes.

Q. Michael, earlier we were discussing the events that happened November 9, 1989. I would like to talk about them again.

At about quarter to 6:00 that evening, who were you with?

A. Ice Mike and Jamo.

Q. And where were you?

A. We was walking around at Stateway.

Q. And where were you going to?

A. We was going to 37, but before we got to 37, we ran into Kevin Young and Tom Slick and Starsky and Numms.

Q. Michael, when you say you were going to 37, what is 37?

A. 37 and Federal.

Q. Michael, you said the name Ice Mike. What is Ice Mike's real name?

A. Michael Meyers.

Q. What is Starsky's real name?

A. Eric Smith.

Q. You mentioned the name Ace Dog. Who is Ace Dog?

A. Kevin Young.

Q. You mentioned the name Tom Slick, I believe. Who is that?

A. Tom Carter.

Q. You mentioned the nickname Numms. Who is that?

A. Cortez Bannister.

Q. I believe you mentioned the name Jamo. Who is Jamo?

A. James Young.

Q. Where did the group of you meet up?

A. At 3651 South Federal.

Q. And when you were all there, what did you talk about?

A. We was just talking for approximately a couple minutes about how Kevin Young's woman got raped and they wanted to seek revenge on the Del Vikings.

Q. Why did they want to seek revenge on the Del Vikings?

A. Because the Del Vikings was supposed to have raped Kevin Young's girlfriend.

Q. Do you know what her name is?

A. Peaches.

Q. Do you know what her real name is?

A. No.

Q. How was revenge going to be sought?

A. By killing.

Q. And who were you going to kill?

A. Anybody who was out there that was a Del Viking.

Q. So what did the seven of you do then?

A. We left 3651 and went to 3618 South State.

Q. And what did you do there?

A. We got over there and seen Rick James, and Ace Dog was calling Rick James and Rick James was saying, hey, Numms, man, what's up. And Rick started running and Ace Dog started shooting.

Q. Is Rick James a Del Viking?

A. I don't really know if he is a Del Viking.

Q. Did anyone else of the group of the seven of you have guns?

A. Yes.

Q. Do you know what types of guns everybody had?

A. Yeah.

Q. What type of gun did Ace Dog have?

A. His was a—when he was at 3618, he had a Tech 9.

Q. Was this before the group of you ran into Rick James?

A. Yeah, when we ran—at the time we ran into him.

Q. And what type of gun did Starsky have?

A. .44 automatic.

Q. And what type of gun did Tommy Slick have?

A. A carbine.

Q. And what type of gun did Ice Mike have?

A. .45 automatic.

Q. What about Jamo?

A. A .38.

Q. And what about Numms?

A. A .357.

Q. And what kind of gun did you have?

A. A .25 automatic.

Q. After the incident happened with Rick James, what is the next thing that happened?

A. We ran to the second building.

Q. When you say the second building, what do you mean by that?

A. 3547 and 49.

Q. Did all seven of you run to that building?

A. Yes.

Q. And where did you go when you all ran to that building?

A. We stayed at that building about two minutes or three minutes, and then we walked to 3651.

Q. And what did you do when you got to that building?

A. Went to 3—I think it's 311 or 309. 309.

Q. You mean apartment 309?

A. Yes.

Q. What did you do when you were there?

A. Set up there for about an hour or two.

Q. Why?

A. Talking.

Q. And after you were up there for an hour or two, where did you go next?

A. We had left from up there and we went to the first building.

Q. And what is the first building?

A. 3517 and 19.

Q. Were all seven of you still together?

A. Yes.

Q. And where did you go when you went to that building?

A. I went to the back hallway in 3517, me and Ice Mike.

Q. And where did the rest of the group go?

A. Ace Dog, Starsky and Tom Slick, they was standing behind the mailbox. And Jamo and Numms, they was standing on the 19 side, on the porch.

Q. When you say on the 19 side, what do you mean?

A. 3519.

Q. And you and Ice Mike were exactly where?

A. In the back hallway on the 3517 side.

Q. Did all seven of you still have your guns?

A. Yes.

Q. And what were you going to do when you went to that building?

A. We was going, like I said, we was going to seek revenge on what happened to Peaches.

Q. When you got to that building, about what time was it?

A. About 10:05.

Q. Okay. When you were all there, what happened?

A. We was just standing around for about a minute and then I heard Starsky hollered out, come here.

Q. Did you see who he hollered to?

A. No.

Q. What is the next thing that happened after that?

A. I heard some shots go off and me and Mike ran out there.

Q. You and Mike ran to where?

A. We ran out to the front of the building to see what was happening. They were shooting at Danny Williams.

Q. When you say they, who do you mean?

A. Starsky, Numms, Jamo, Tom Slick, Ace Dog.

Q. When you saw that was happening, what did you and Ice Mike do?

A. We had fired a shot.

Q. Did you each pull out your guns and fire shots?

A. Yes.

Q. What is the next thing you remember happening, Michael?

A. We had left and went back to the second building, 3549 and 47 building.

Q. Let me back up for a moment.

At the time that you and Ice Mike ran back and saw the other five firing at Dan Williams, did you know that that person being fired at was Dan Williams at the time?

A. No.

Q. What was Dan Williams doing when he was being fired at?

A. Running.

Q. Where was he running to?

A. To IIT.

Q. Where exactly did he go?

A. He ran to the middle circle door at IIT and fell out.

Q. What do you mean when you say he fell out?

A. Passed out.

Q. After you saw that, what did you do?

A. We all went back to the second building.

Q. All seven of you?

A. Yes.

Q. Where exactly in the second building did you go?

A. To 3547 on the 16th floor, 1611.

Q. And what did you all do when you got up there?

A. Just stayed up there for a little while until the police left.

Q. Then where did you go?

A. Me, Ice Mike[,] Jamo, Numms, Ace Dog, and Tom Slick went to the third building.

Q. Where was Starsky at this point?

A. He jumped in the car and drove off.

Q. So when the six of you went to the third building, what did you do there?

A. Went to the 6th floor.

Q. And what did you do when you got to the 6th floor?

A. We went to 610 and set up there for about five minutes. Then we all left, went back downstairs, and me, Jamo, Ice Mike had walked out towards 37th and State and they jumped on the bus and I walked to Michigan.

Q. And where exactly did you go?

A. To my woman's auntie's house.

Q. Michael, what happened to the guns that were used in the shooting that happened around 10:00?

A. I don't know.

Q. What happened to the gun that you had?

A. I sold it.

Q. Michael, since you have been here, have you been treated well by the police that are here, by this detective?

A. Yes.

Q. Have you been treated well by me?

A. Yes.

Q. Michael, have you had something to eat since you have been here?

A. Yes.

Q. What have you eaten?

A. McDonald's and two slices of bread because I am allergic to bologna.

Q. And have you been able to use the bathroom?

A. Yes.

Q. Have you had something to drink since you have been here?

A. Yes.

Q. And do you smoke cigarettes?

A. Yes.

Q. Have you been able to smoke cigarettes?

A. Yes.

Q. Michael, has anybody promised you anything in exchange for giving this statement?

A. No.

Q. Has anybody threatened you or coerced you in any way into giving this statement?

A. No.

Q. Are you giving this statement of your own free will?

A. Yes.

MS. LAMBUR: That concludes the statement of Michael Johnson. The time is approximately 10:40 p.m.

[Signed]
MICHAEL JOHNSON

ASA [Signed] DET [Signed]

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No. 09-1576

SUPREME COURT, U.S.
FILED
OCT 27 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES BANNISTER,

Petitioner,

v.

ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In entering a plea agreement with a witness at petitioner's trial, the State relied upon the witness's account of the crime provided immediately following the crime and in pre-plea interviews.

Did it violate due process for the plea agreement to include a requirement that the witness testify at trial in a manner consistent with his earlier statements to law enforcement, where the same agreement – in multiple plea provisions that petitioner does not challenge – additionally required the witness to testify truthfully at petitioner's trial and required that his earlier statements also prove to be truthful?

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BRIEF IN OPPOSITION

Respondent, the State of Illinois, respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment of the Illinois Supreme Court affirming petitioner's convictions for first degree murder.

STATEMENT

Following the November 9, 1989, shooting deaths of Dan Williams and Thomas Kaufman, petitioner James Bannister and six others were charged with two counts of first degree murder. Pet. App. 2a, 33a. Petitioner was tried jointly with five of his co-defendants (Thomas Carter, Michael Meyers, Eric Smith, James Young, and Kevin Young). *Id.* at 33a-34a. The remaining co-defendant, Michael Johnson, was granted a severance and was tried separately. *Id.* at 34a. All seven men were convicted on both counts of first degree murder. *Id.* at 2a. After several appeals and post-conviction petitions, the trial court ordered a new trial for petitioner and codefendant Smith based on a claim of newly discovered evidence following an evidentiary hearing on their post-conviction petitions. *Id.* at 3a. The remaining defendants did not receive new trials. *Ibid.*

Johnson did not testify at petitioner's first trial. At petitioner's new trial, however, Johnson testified against petitioner pursuant to a plea agreement reached with the People. *Id.* at 3a-4a. The plea agreement, by its terms, required Johnson to "testify truthfully in all matters regarding the 1st Degree Murders of Dan Williams and Thomas Kaufman" and required that "[s]uch truthful

testimony shall be consistent with" his post-arrest statements and with his statements in the pre-plea agreement interviews. *Id.* at 68a. The agreement also provided that it would be "render[ed] null and void, and all violations of criminal law by Michael Johnson will be fully prosecuted by Cook County State's Attorney's Office" if the "[r]epresentations made by Michael Johnson during his post-arrest statements and his pre-plea agreement interviews, upon which this agreement was predicated . . . are found to be false." *Id.* at 70a. The parties also agreed to move to vacate Johnson's existing sentence and to place the case back on the trial court's trial call. *Ibid.* As part of the agreement, Johnson pledged to plead guilty to the first degree murder of Dan Williams, and the People agreed to nolle pros the first degree murder count involving Thomas Kaufman. *Ibid.* The People also agreed to recommend that the trial court sentence Johnson to sixty years in prison. *Ibid.* The agreement was contingent on the trial court accepting all of the terms in their entirety. *Ibid.*

Following a bench trial, the trial court found petitioner guilty of the first degree murders of Dan Williams and Thomas Kaufman. *Id.* at 7a. The trial evidence established that on November 9, 1989, petitioner, Smith, Carter, and Kevin Young ran into Johnson, James Young, and Meyers at the Stateway Gardens housing projects in Chicago. Pet. App. 6a. All seven men went upstairs to the apartment of Tiya Young, the niece of Kevin Young. *Ibid.* There, they talked about the recent sexual assault a few days earlier of Kevin Young's girlfriend. *Ibid.* They talked about getting revenge on the Del Vikings gang because they believed that the Del Vikings were responsible. *Ibid.* They discussed retaliating physically and shooting people. *Ibid.*

The seven men then left and went to another building in the complex. *Ibid.* All had guns. *Ibid.* Petitioner had a .357 revolver. Pet. App. 39a.

When they arrived at 3618 South Federal Street, a man with the nickname "Rick James" came out of that building. *Id.* at 6a, 39a. Rick James greeted petitioner by petitioner's nickname. Pet. App. 6a. Kevin Young shot at Rick James. *Ibid.* After he shot at Rick James, all seven men ran to the 3547-3549 building. *Id.* at 6a, 39a.

The seven armed men stayed at the 3547-3549 building for ten to twenty minutes, and then they went back to Tiya Young's apartment. Pet. App. 40a. They stayed there for approximately 45 minutes to an hour and talked and smoked. *Ibid.* They then left that apartment and walked to another building in the complex. *Id.* at 6a, 40a.

When they arrived, the men encountered Daniel Nicholson, who was in a wheelchair. *Ibid.* Nicholson had just come off the ramp and had turned into the building in his wheelchair. Pet. App. 40a. Kevin Young, Smith, Meyers, and James Young went into the hallway behind Nicholson. *Id.* at 40a, 42a. Petitioner, Johnson, and Carter stood on the first-floor porch. *Ibid.* The four men near Nicholson robbed him. *Id.* at 6a, 40a. Kevin Young reached into Nicholson's pockets, and Nicholson took off some of his gold chains and gave them to Kevin Young. Pet. App. 40a. At this point, all seven men had their guns out. *Id.* at 40a, 42a.

After Kevin Young took the chains from Nicholson, the seven men left and returned to 3547-3549 South Federal Street. *Id.* at 6a, 40a. Johnson then told the others that he

was going upstairs to his apartment to get a ski mask and some "wave" caps, which resemble scarves. *Ibid.* After retrieving the ski mask and caps, Johnson rejoined the others and gave caps to Kevin Young and Carter, while keeping the ski mask for himself. *Ibid.*

The seven men then walked together through the breezeways to the building at 3517-3519 South Federal, where Johnson and Meyers went to the side of the building near the back hallway. *Id.* at 40a. Smith, Kevin Young, and Carter stood behind what Johnson called the "mailbox" in the breezeway area. *Ibid.* Petitioner and James Young stood on the 3519 side of the building. *Ibid.*

As Johnson and Meyers walked through the back hallway, they encountered Gregory Gordon, Willie Sims, and two women who were standing by the elevators. *Ibid.* Johnson was wearing his ski mask, and Meyers was wearing a "wave" cap. *Ibid.* Johnson and Meyers also encountered Denise Brady, Antoinette Barry, and Joe Johnson, who were emerging from the 3517 building via the stairway. *Ibid.*

Johnson then heard Smith say, "come here, mother * * *." *Id.* at 41a. Nicholson and Gordon also heard that statement. *Id.* at 42a-43a. Upon hearing the gunshots, Johnson and Meyers went to the front of the building to see what was happening. *Id.* at 7a, 41a. Johnson saw Dan Williams running. *Ibid.* Petitioner, Smith, Johnson, Meyers, Carter, Kevin Young, and James Young all fired their guns at Williams. *Ibid.* Kevin Young stood behind the mailbox, just under the breezeway, with Smith and Carter. *Id.* at 41a. Petitioner and James Young stood on the ramp from the 3519 side of the building. *Ibid.* Petitioner,

James Young, Kevin Young, Smith, and Carter stepped out from underneath the building while shooting at Williams. *Ibid.* Johnson also shot at Williams, who ran to the playlot, jumped the fence, and ran toward 35th Street and the Illinois Institute of Technology building. *Id.* at 7a, 41a. Williams was fatally shot upon arriving at the building, as was Thomas Kaufman, a security guard there. *Id.* at 2a.

When the shooting stopped, Johnson retrieved a .25 automatic shell casing that had been discharged from his gun and put it in his pocket. *Id.* at 41a. All seven of the shooters then went back south towards the 3547 building. *Id.* at 7a, 41a.

At the conclusion of the bench trial, the court found petitioner and co-defendant Smith guilty of the first degree murders of Dan Williams and Thomas Kaufman and sentenced petitioner to natural life in prison. *Id.* at 7a. Petitioner appealed and raised several issues, including whether "he was denied due process and deprived of a fair trial based upon the plea agreement entered into between the prosecution and co-defendant Michael Johnson." *Id.* at 33a.

The Illinois Appellate Court rejected all of petitioner's arguments. About the challenge to Johnson's plea agreement, the court held that petitioner did not have standing to contest the validity or enforcement of the plea agreement because petitioner was not a beneficiary of that agreement. *Id.* at 53a. And even if petitioner had standing, the appellate court held, and "even if the plea agreement were found to be invalid, the only consequence would be that it could not have been enforced by either the State or Johnson." *Id.* at 56a. The court further noted that

petitioner had failed to cite any authority indicating that a determination that the plea agreement was invalid would have required suppression of Johnson's testimony. *Ibid.*

The appellate court also rejected petitioner's argument that he was deprived of due process and a fair trial based upon the terms of the plea agreement, which required Johnson to testify truthfully and consistently with his post-arrest statements and statements made to the prosecutors. *Id.* at 48a-52a. Following the reasoning of decisions from other States, the appellate court held that consistency provisions such as the one in Johnson's plea agreement are permissible when they are accompanied by terms requiring the witness to testify truthfully. *Id.* at 48a-51a. Accordingly, the appellate court concluded that "Johnson's testimony was not tainted by the plea agreement, and the admission of his testimony, induced by the plea agreement, did not violate the petitioner's rights to due process and a fair trial." *Id.* at 52a.

Following the appellate court's decision affirming his convictions, petitioner filed a petition for leave to appeal to the Illinois Supreme Court, which that court allowed. *Id.* at 1a-2a, 7a-8a. Like the appellate court, a majority of the supreme court analyzed cases from other jurisdictions and held that the plea agreement here did not violate petitioner's due process rights because it repeatedly required Johnson to testify truthfully. *Id.* at 10a-17a. Relying on *State v. Rivera*, 109 P.3d 83 (Ariz. 2005), *State v. Bolden*, 979 S.W.2d 587 (Tenn. 1998), *People v. Jones*, 600 N.W.2d 652 (Mich. Ct. App. 1999), and *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197 (Nev. 1991), and relying on the specific terms used in Johnson's plea agreement, the supreme court held that the agreement did not taint Johnson's testimony, and its admission did not

violate petitioner's due process rights. Pet. App. 13a-17a. As the supreme court explained:

> Here, the plea agreement repeatedly and explicitly obligated Johnson to testify truthfully. The agreement also provided that Johnson would testify in a manner that was consistent with his prior statements to police and to prosecutors, but if any of the representations contained in his prior statements were found to be false, the agreement would be rendered null and void. Truthfulness was the overriding requirement of the agreement. The agreement neither compelled Johnson to disregard his witness' oath, nor bound him to a particular script or result. Accordingly, Johnson's testimony was not tainted by the plea agreement, and the admission of his testimony did not violate the defendant's rights to due process and a fair trial.

Id. at 17a. The supreme court observed that, at trial:

> [t]he State, on direct examination of Johnson, fully disclosed the terms of the plea agreement with him, and the defendant had an opportunity to cross-examine Johnson about the agreement and the benefits he would receive. The trial court heard the details of Johnson's plea agreement and found him to be credible nonetheless. As the finder of fact, it was the trial court's responsibility to resolve alleged inconsistencies and conflicts in the evidence, as well as to weigh the testimony and determine the credibility of the witnesses.

Id. at 18a.

Following the Illinois Supreme Court's decision, petitioner filed a petition for rehearing, which the court denied on January 25, 2010. *Id.* at 67a.

REASONS FOR DENYING THE PETITION

Petitioner's claim regarding whether the Due Process Clause is violated by a plea agreement that requires truthful testimony consistent with a witness's prior statements is not worthy of certiorari review for three reasons. First, no split of authority exists on this point. The lower courts agree that plea agreements like Johnson's are proper because they expressly require the witness to testify truthfully. Second, even if the so-called "consistency" clause had been excised from this particular plea agreement, the alleged incentive for Johnson to testify consistently would have remained the same because the unchallenged terms in the "Limitations of Plea Agreement" would have rendered the agreement "null and void" if he did not testify truthfully at trial or if the representations he made to police and prosecutors upon which the agreement was predicated were found to be false. Finally, the Illinois Supreme Court was correct on the merits.

I.

This Case Implicates No Split In Authority Worthy Of Certiorari Review.

As the Illinois Supreme Court and many other courts have held, a plea agreement based on a witness testifying similarly to, or consistently with, a prior statement is proper under the Due Process Clause so long as the plea

agreement is also expressly conditioned on the witness testifying truthfully. See *State v. Rivera*, 109 P.3d 83, 86-89 (Ariz. 2005) (en banc) (also citing cases); *People v. Jones*, 600 N.W.2d 652, 657-658 (Mich. App. Ct. 1999); *State v. Bolden*, 979 S.W.2d 587, 591-592 (Tenn. 1998); *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197, 198 (Nev. 1991); *State v. Nerison*, 401 N.W.2d 1, 8 (Wis. 1987). As *Jones* explained:

> When a prosecutor decides to bargain with a witness on the basis of representations made by the witness during negotiations with the state, it is reasonable for the prosecutor to rely on the witness' assertion that such representations are truthful – especially when the representations are consistent with other facts within the prosecution's knowledge of the case.

Jones, 600 N.W.2d at 657. Accordingly, "it is reasonable to allow the prosecution to condition a grant of immunity, or other favorable treatment, on the truthfulness of the information providing the basis for the favorable treatment." *Ibid.* In *Jones*, as here, "by agreeing to testify truthfully at trial in conformance with their prior statements to the police, the immunized witnesses effectively represented to the prosecution that their prior statements had been truthful." *Id.* at 658.

Likewise, in *Bolden*, the Tennessee Supreme Court held that expecting particular testimony from a witness as a condition of a plea agreement is not a violation of due process so long as the testimony must be truthful. *Bolden*, 979 S.W.2d at 591-92 (citing *State v. Burchett*, 399 N.W.2d 258, 266-67 (Neb. 1987); *State v. Clark*, 743

P.2d 822, 828-29 (Wash Ct. App. 1987); *Acuna*, 819 P.2d at 200-01). As the *Bolden* court observed, "[s]everal state courts have concluded that requiring specific testimony of a co-defendant as a condition of a plea agreement is not a violation of due process so long as the testimony is required to be truthful." *Id.* at 591. The court noted that "'it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require * * * preclusion.'" *Id.* (*quoting Burchett*, 399 N.W.2d at 266-67). *Bolden* thus distinguished on their facts cases in which the plea agreement required *only* that the witness testify in a particular fashion or that the testimony produce a specific result, without regard to the truthfulness of the testimony. *Id.* at 592 n.3 (*citing People v. Medina*, 41 Cal. App. 3d 438, 455 (Cal Ct. App. 1974); *People v. Green*, 228 P.2d 867, 868-72 (Cal Ct. App. 1951)). Because the plea agreement in *Bolden* specifically required the co-defendant to testify truthfully, that condition "necessarily engulfed" the other terms in the agreement, compliance with which was "hinged upon truthful testimony." *Id.* at 592. The court held that the codefendant's testimony did not violate the defendant's rights to due process and a fair trial even though it had been induced by a plea agreement that required consistency with a prior statement because that same agreement required truthful testimony. *Id.* at 593.

The Nevada Supreme Court has explained why such agreements are not just legal and enforceable, but also reasonable:

> [I]t would be neither realistic nor fair to expect the State to enter into a bargain without assurances that the promisee's trial testimony

> would be consistent with the information he or she provided to prosecutors as a basis for leniency. We are simply unwilling to assume, and therefore base a rule of law upon, the proposition that our prosecutors will sit down with persons vulnerable to prosecution and commit them to testifying perjuriously. If the person seeking the bargain purports to have true information, and the State concludes that such information is reliable and would be of assistance in prosecuting other persons, the State, in return for a commitment of leniency, would have every right to expect that the promisee's trial testimony would be essentially consistent with the original information upon which the State's promise was induced. If the promisee reneges on the commitment to provide truthful and consistent trial testimony, the State will be free to withdraw from the bargain.

Acuna, 819 P.2d at 198. Accordingly, the Nevada Supreme Court held that "[w]e now conclude that bargaining for specific trial testimony, i.e., testimony that is essentially consistent with the information *represented to be factually true* during negotiations with the State, and withholding the benefits of the bargain until after the witness has testified, is not inconsistent with the search for truth or due process." *Id.* (emphasis added).

Similarly, the Wisconsin Supreme Court has held that a plea agreement that required a witness to testify consistently with his testimony at an earlier hearing was "no different from any other [case] involving negotiated plea agreements with accomplices in exchange for their

testimony." *Nerison*, 401 N.W.2d at 8. *Nerison* explained that, "[u]ltimately, it is for the jury as factfinder to weigh the testimony and evaluate credibility before making its ultimate determination in the form of its verdict as to what is the 'truth.'" *Id.*

The Arizona Supreme Court reached the same result in *Rivera*. There, the prosecution entered into plea agreements with two witnesses who admitted to being accomplices of the defendant. 109 P.3d at 84. Each witness avowed in the agreement that statements given in earlier videotaped interviews were fully accurate and truthful. *Id.* And the agreements stated that each agreement by the State was made on the basis that the witnesses' avowals were true. *Id.* The witnesses also agreed in the plea agreement to testify fully, accurately, and truthfully in any trial against her co-defendants. *Id.* At trial, each witness testified that she understood that any significant variation from the statements each made in the earlier pre-trial interview could cause that witness to lose the benefit of her plea agreement. *Id.* at 84-85. Each witness also testified that she understood that the plea agreement required her to testify truthfully, and that she had done so. *Id.* at 85.

The defendant in *Rivera* argued that, pursuant to prior Arizona precedent (*State v. Fisher*, 859 P.2d 179 (Ariz. 1993)), the plea agreements contained illegal consistency clauses that deprived him of a fair trial. *Rivera*, 109 P.3d at 85. The Arizona Court of Appeals agreed and reversed and remanded for a new trial. *Ibid.* The Arizona Supreme Court subsequently "granted review to decide whether the court of appeals misapplied *Fisher []* in holding that the accomplice witnesses' plea agreements were impermissible consistency agreements." *Ibid.*

The Arizona Supreme Court reversed the court of appeals and affirmed the defendant's conviction, holding that the plea agreements were lawful. *Id.* at 86-89. The court noted that the plea agreements required the witnesses to testify truthfully and to avow that their prior statements were truthful. *Id.* at 86. The Arizona Supreme Court then distinguished *Fisher* because the plea agreement there did not require the witness to testify truthfully, but only required the witness to testify consistently with her prior statement regardless of its truth. *Ibid.* As the court explained, "[o]ur concern in *Fisher []* was that enforcing a consistency provision would allow the prosecutor 'to persuade an accomplice to disregard his oath of truthfulness' in order to obtain a lenient plea deal." *Ibid.* (*quoting Fisher*, 859 P.2d at 184).

Significantly, the Arizona Supreme Court stated that "[t]he critical issue is not whether the witness will feel an obligation to testify to the same facts earlier told the prosecutors or police, but rather whether the prosecution has conditioned the plea agreement upon such testimony, regardless of the truth of the earlier statement." *Ibid.* The court observed that "a consistency agreement has the strong potential to procure untruthful testimony if the agreement is not also conditioned upon the requirement of truthful testimony," and that "[i]t is this tainting of the 'truth-seeking function of the courts' that makes consistency provisions invalid." *Ibid.* As a result, the court held, "what *Fisher []* forbids is an agreement that requires the witness to testify consistently with a previous statement at trial even when doing so would render the trial testimony untruthful." *Ibid.*

Here, the plea agreement with Johnson repeatedly required that Johnson testify truthfully. For example, in

its first sentence, the agreement states: "It is agreed that Michael Johnson will testify truthfully regarding the 1st Degree Murders of Dan Williams and Thomas Kaufman * * *." Pet. App. 68a. The next sentence states that "[s]uch truthful testimony shall be consistent with" Johnson's post-arrest statements and with his statements in the pre-plea agreement interviews. *Ibid.* The first sentence of the next paragraph also states that "[i]t is agreed that Michael Johnson will testify truthfully in the case of *People v. James Bannister and Eric Smith* * * *." Pet. App. 69a. The first sentence of the following paragraph again refers to Michael Johnson's "truthful testimony" in this case. Pet. App. 69a. The trial court, as the trier of fact, heard all of the evidence, including the facts surrounding Johnson's plea agreement. Pet. App. 18a. After considering all of these facts, the court found Johnson to be credible and that Johnson told the truth when he testified at trial. Pet. App. 18a. The decision of the Illinois Supreme Court below thus is in accord with the forgoing authority. In contrast, petitioner's supposed split is illusory.

Petitioner points to the decisions of the United States Court of Appeals for the Armed Forces in *United States v. Gilliam*, 23 C.M.A. 4 (1974), and *United States v. Stoltz*, 14 C.M.A. 461 (1964). Pet. at 11-12. Significantly, however, neither *Gilliam* nor *Stoltz* involved a due process challenge, and the plea agreements at issue in those two cases lacked truthfulness provisions. See *Gilliam*, 23 C.M.A. at 8; *Stoltz*, 14 C.M.A. at 464-65. *Gilliam* and *Stoltz* , therefore, do not conflict with the decision below.

Nor do the California cases on which petitioner relies conflict with the decision below. Petitioner cites *People v. Allen*, 729 P.2d 115, 130-31 (Cal. 1986), and *People v.*

Garrison, 765 P.2d 419, 430 (Cal. 1989) (Pet. at 12-13), both of which relied on *People v. Medina*, 41 Cal. App. 3d 438 (Cal. Ct. App. 1974). In none of those cases, however, did the agreement contain a truthfulness provision. Indeed, the California Supreme Court more recently clarified the *Medina* rule, holding that a plea agreement requiring an accomplice to testify fully and truthfully is valid, "even if it is clear the prosecutor believes the witness's prior statement to the police is the truth, and deviation from that statement in testimony may result in the withdrawal of the plea offer." *People v. Jenkins*, 997 P.2d 1044, 1119-20 (Cal. 2000). Such an agreement does not dictate the accomplice's testimony in a manner that would offend due process. *Ibid.* Accordingly, *Garrison* and *Allen* are distinguishable from the instant case, and *Jenkins* makes clear that there is no split between California and Illinois over agreements, such as Johnson's, that require the witness to testify truthfully. Accordingly, *Garrison* and *Allen* are not grounds for granting certiorari. See generally Stern *et al.*, *Supreme Court Practice*, § 4.4, at 230 (8th ed. 2002) ("A conflict with a decision that has been discredited or that has lost all weight as authority by reason of intervening decisions of * * * the same court[] will not be an adequate basis for granting certiorari.").

That leaves only *State v. Dixon*, 112 P.3d 883 (Kan. 2005), but because the Kansas Supreme Court relied on overturned authority, *Dixon* provides no grounds for granting certiorari, either. *Dixon* relied for its holding almost exclusively on *State v. Fisher*, 859 P.2d 179 (Ariz. 1993), and the appellate court decision in *State v. Rivera*, 86 P.3d 963 (Ariz. App. Ct. 2004) (*Dixon*, 112 P.3d at 914-17), yet failed to recognize that the Arizona Supreme Court, two months earlier, had reversed the appellate

court in *Rivera* and limited *Fisher*. *State v. Rivera*, 109 P.3d 83, 86 (Ariz. 2005). See *supra* pp. 12-14. Given that *Dixon* conflicts with the decisions of all other courts that have addressed the constitutionality of consistency provisions, when those provisions are coupled with a requirement that the witness testify truthfully, including the Arizona Supreme Court in the very case on which *Dixon* itself relied, *Dixon*'s future in Kansas is, at best, uncertain.

Moreover, contrary to petitioner's assertion, he would not likely prevail under the laws of Iowa, Nebraska, or Washington, states in which petitioner acknowledges "courts have not directly confronted the issue." Pet. at 14. At the outset, *State v. DeWitt*, 286 N.W.2d 379, 384-85 (Iowa 1979), is far afield, for in that case the plea agreement did not require the witness to testify consistently with prior statements or that such consistent testimony be truthful. *State v. Burchett*, 399 N.W.2d 258, 266-67 (Neb. 1986), is likewise in line with the decision below because there, as here, the plea agreement required the witness to speak truthfully to a prosecutor about the crime and to testify truthfully at trial. *Burchett*, 399 N.W.2d at 266-67. The Nebraska Supreme Court confirmed the propriety of the agreement on the basis of the truthfulness requirement, *Burchett*, 399 N.W.2d at 267, just as the Illinois Supreme Court did below. And in *State v. Clark*, 743 P.2d 822, 828 (Wash. Ct. App. 1987), the court followed *Medina*, which, as explained, see *supra* p. 15, has itself been clarified to preclude any constitutional infirmity in a plea agreement requiring an accomplice to testify truthfully, "even if it is clear the prosecutor believes the witness's prior statement to the police is the truth, and deviation from that statement in testimony may result in the withdrawal

of the plea offer." *Jenkins*, 997 P.2d at 1120. Moreover, the agreement in *Clark* only imposed conditions on the witness's statement concerning the crime, not his later testimony at trial. *Clark*, 743 P.2d at 859. In short, *DeWitt*, *Burchett*, and *Clark* do not support the due process rule that petitioner avows.

Finally, as to petitioner's claim that he might prevail under the approach of the Nevada Supreme Court in *Franklin v. State*, 577 P.2d 860 (Nev. 1978), Pet. at 14-15, *Franklin* is no longer good law, having been expressly overruled by *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197 (Nev. 1991) ("Having reevaluated the *Franklin* rule and concluded that it should not be further perpetuated, we reverse without determining whether the district court erred in finding a violation of the *Franklin* standard"). In *Acuna*, upon which the Illinois Supreme Court relied, the Nevada court "conclude[d] that [its] rather isolated *Franklin* rule is of limited benefit to the search for truth, and that it in fact may tend to frustrate truth and create incentives for dissembling at trial." *Acuna*, 819 P.2d at 198. The court then held that "bargaining for specific trial testimony, i.e., testimony that is essentially consistent with the information represented to be factually true during negotiations with the State, and withholding the benefits of the bargain until after the witness has testified, is not inconsistent with the search for truth or due process." *Id.* Nevada law thus does not conflict with Illinois's.

Petitioner attempts to distinguish *Acuna* by asserting that it "reaffirmed * * * that the prosecution may not present testimony 'where the bargain [itself] compels the witness to provide particularized testimony.'" Pet. at 15 n.5 (quoting *Acuna*, 819 P.2d at 201). But *Acuna* was

speaking in the context of plea agreements that require only consistent testimony and not that the testimony also be truthful. Here, the agreement repeatedly required that the testimony be truthful, which makes petitioner's attempt to distinguish *Acuna* unavailing. Indeed, *Acuna* cited *Medina* and *Garrison* as support, and as explained *supra* p. 15, these California cases are consistent with the decision below.

In short, petitioner's alleged split is illusory, and certiorari review is unwarranted.

II.

Certiorari Should Be Denied On The Independent Ground That Eliminating The So-Called "Consistency" Clause That Petitioner Challenges Would Not Have Changed Johnson's Incentive To Testify Truthfully And Consistently At Trial.

Petitioner challenges just one part of the plea agreement with Johnson: the one-sentence requirement that "[s]uch truthful testimony shall be consistent with Michael Johnson's post-arrest statements in December 28, and December 29, 1989, to Chicago Police officers and Cook County Assistant State's Attorneys and his statements made to Cook County State's Attorney personnel during his pre-plea agreement interviews on April 29 and May 24, 2004." Pet. App. 68a. Even if this so-called "consistency" clause was excised from the plea agreement, however, Johnson's alleged incentive to testify consistently with his earlier statements would have remained the same in light of other unchallenged terms in the "Limitations of Plea Agreement" included in his plea.

The "Limitations of Plea Agreement" section provides that the agreement would become "null and void" if one of several things occurred, including (in clause "B") Johnson's "[f]ailure * * * to truthfully testify under oath in open court in the above matters" or (in clause "F") a finding that "[r]epresentations made by * * * Johnson during his post-arrest statements and his pre-plea agreement interviews, upon which this agreement was predicated," are "false." Pet. App. 70a. Read together, these "truthfulness" provisions alone required Johnson to testify at trial in substantial conformance to his prior, post-arrest and pre-trial statements, and petitioner cannot claim any meaningful distinction between that (unchallenged) incentive to testify consistently and the (challenged) incentive to do so purportedly instilled in Johnson by the "consistency" provision. If the latter gave Johnson any additional incentive to testify consistently in this case, it is difficult to see what that added incentive was, much less how it would be constitutionally significant on these facts. Indeed, notwithstanding the "truthfulness" and "consistency" provisions, Johnson felt free to make some adjustments to his account between his post-arrest/pre-trial statements and petitioner's trial. See Pet. App. 7a (noting that Johnson's trial testimony was "*substantially* consistent with the statement that he gave to the police on December 29, 1989, the day after his arrest") (emphasis added). For instance, in his 1989 post-arrest statement, Johnson omitted the entire encounter and robbery of Nicholson, which occurred between the confrontation with Rick James and the shooting of the victims. (Pet. App. 73a-83a). At trial, however, Johnson described the robbery of Nicholson in detail. Pet. App. 40a. But to avoid implicating petitioner as a murderer – which alone might have affected the outcome of this case – Johnson would

have had to change his testimony profoundly between his post-arrest/pre-plea statements and trial, and if Johnson had changed his account so fundamentally, the State would have known that at least one of two things was true: either Johnson lied when he gave his post-arrest/pre-plea statements, or he lied in court. Cf. *Rivera*, 109 P.3d at 87 (theorizing that, in some cases, "truthfulness" requirements might permit witness to make some adjustments to account between pre-trial statements and trial testimony). Either way, the plea agreement would have been void under the "truthfulness" provisions alone, without resort to the challenged, "consistency" provision.

In short, even without the challenged, express "consistency" clause at the beginning of the agreement, the rest of the agreement – which petitioner has not challenged – would have provided the same alleged incentive to Johnson to testify consistently with his earlier statements. Petitioner does not contend a split exists regarding the constitutionality of these "truthfulness" requirements. Indeed, petitioner appears to endorse them. See Pet. at 24 (arguing that "truthfulness" provisions in Johnson's plea agreement were not enough to *cure* a due process violation). But this guts his due process claim on these facts, for he must argue that the challenged "consistency" provision alone created an unconstitutional incentive for Johnson to testify consistently at trial, but he cannot begin to make that showing here where unchallenged portions of the agreement already created the same incentive. Accordingly, under these facts, certiorari would be inappropriate.

III.

On The Merits, The Illinois Supreme Court Correctly Concluded That The Plea Agreement Protected Pétitioner's Right To Due Process Because It Repeatedly Provided That The Witness Had To Testify Truthfully And That The Agreement Would Become Void If The Representations Upon Which It Was Based Were False.

Johnson's plea agreement protected petitioner's right to due process. The agreement repeatedly required that Johnson testify truthfully. Pet. App. 68a-70a. While the agreement also provided that his truthful testimony had to be consistent with his prior statements to the police and prosecutors, it also expressly stated that the agreement would be void if it was later found that those prior statements were false. Pet. App. 68a, 70a. Petitioner does not object to the "truthfulness" provisions, and the Illinois Supreme Court correctly concluded that the plea agreement here protected petitioner's right to due process because "[t]ruthfulness was the overriding requirement of the agreement." Pet. App. 17a.

Unquestionably, "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). Accomplice testimony is generally admissible at trial, even if it was procured by the offer of a lenient sentence and secured by a plea agreement. See *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). Cross-examination, not exclusion, is the

appropriate method for probing the truthfulness of a witness's statement. *Hoffa v. United States*, 385 U.S. 293, 311 (1966). "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Id.* Moreover, the Nevada Supreme Court observed in *Acuna*, "it would be neither realistic nor fair to expect the State to enter into a bargain without assurances that the promisee's trial testimony would be consistent with the information he or she provided to prosecutors as a basis for leniency." 819 P.2d at 198. "We are simply unwilling to assume, and therefore base a rule of law upon, the proposition that our prosecutors will sit down with persons vulnerable to prosecution and commit them to testifying perjuriously." *Id.*

Petitioner does not object to the truthfulness provisions of the agreement or to the provision rendering the agreement void if Johnson's pre-plea statements were false. Instead, petitioner argues that the "consistency" provision makes "an accomplice feel[] pressure to stick to the prosecution's preferred version of events" and is tantamount to "vouching." Pet. at 25-27. Petitioner's argument, however, proves too much. With every plea agreement, the witness may feel implicit pressure to testify favorably to the prosecution, but as *Rivera* recognized, "[s]killful cross-examination should expose to the jury any motivation the witness may have to lie, such as to preserve a favorable plea deal, and the jury must determine the witness's credibility." *Rivera*, 109 P.3d at 85 (citing *Hoffa*, 385 U.S. at 311).

More importantly, the prosecution cannot permit perjury, and in this sense a prosecutor always implicitly "vouches" for the accuracy of the testimony of its witnesses, regardless of whether the witness is testifying pursuant to a plea agreement or not. Either way, the prosecution would not have a witness testify if it believed that the witness would testify falsely. Thus, the alleged "pressure" on Johnson and the concern that the agreement amounted to "vouching" for him is no different than if the plea agreement did not contain the one-sentence consistency provision to which petitioner objects.

In the end, petitioner received due process because the agreement here repeatedly called for Johnson's testimony to be truthful. And the prosecution, on direct examination of Johnson, fully disclosed the terms of his plea agreement. Pet. App. 18a. Petitioner cross-examined Johnson about the agreement and the benefits he would receive. *Ibid.* The trial court heard all of the details of Johnson's plea agreement and still found him to be credible. *Ibid.* As the trier of fact, it was the trial court's "responsibility * * * to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Thus, the Illinois Supreme Court correctly concluded that "Johnson's testimony was not tainted by the plea agreement, and the admission of his testimony did not violate the defendant's rights to due process and a fair trial." Pet. App. 17a. Since the lower court reached the correct result on the merits, certiorari is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

JAMES BANNISTER,

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v.

ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

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REPLY BRIEF ROR PETITIONER

When the State retried petitioner, it decided to deviate from its standard practice – and the standard practice of prosecutors across the country – regarding plea bargains used to present purported accomplice testimony. Instead of simply requiring the purported accomplice to testify truthfully, the State required him to testify consistently with certain prior unsworn statements he had made to the police. In its brief in opposition, the State does not dispute that "prosecutors seem to reserve such [consistency] provisions for cases" – such as this one – "in which accomplices have told prior inconsistent stories and there is no direct corroboration for the story that the prosecution wants the witness to recite." Pet. 17. Nor does the State offer any alternative explanation for its decision to proceed in this manner in petitioner's trial.

The State nevertheless urges this Court to deny certiorari on the ground that consistency provisions supposedly have no effect whatsoever on accomplice testimony. This argument is at odds not only with the State's own decision to go out of its way to insist upon a consistency provision in this case, but also with decisions from several jurisdictions holding that presenting testimony subject to such a provision thwarts the truth-seeking function of trial in violation of the Due Process Clause. The State's argument also contravenes historical norms and this Court's due process jurisprudence. This Court should grant certiorari.

I. Courts Are Divided Over The Question Presented.

Try as it might, the State is unable to reconcile the conflicting case law concerning consistency provisions. In contrast to the Supreme Courts of Illinois, Tennessee, and Wisconsin, the Supreme Courts of California and Kansas, as well as the Court of Military Appeals, categorically prohibit prosecutors from presenting testimony subject to consistency provisions, regardless of any other provisions in an accomplice's plea agreement or the facts of the case. The Nevada Supreme Court also would have found that the testimony at issue here violated due process.

1. *California*. The California Supreme Court has held that due process prohibits the prosecution from introducing testimony subject to consistency provisions. *See* Pet. 12-13 (citing *People v. Allen*, 729 P.2d 115, 130-31 (Cal. 1986); *People v. Garrison*, 765 P.2d 419, 428, 430 (Cal. 1989)). The State asserts, however, that (a) "[i]n none of those cases" did the agreement contain a general provision requiring "truthful" trial testimony; and (b) the California Supreme Court's subsequent decision in *People v. Jenkins*, 997 P.2d 1044 (Cal. 2000), retreated from its prior holdings. BIO 15. Neither assertion is correct.

a. The plea agreements in *Allen* and *Garrison* both contained general truthfulness provisions. *See Allen*, 729 P.2d at 129 n.4 ("Allen hereby agrees that he will testify truthfully and completely . . . ."); *Garrison*, 765 P.2d at 427 ("He will . . . testify truthfully . . . ."). Yet in both cases, the California Supreme Court applied the rule of *People v. Medina*, 116 Cal. Rptr. 133, 145 (Ct. App. 1974), barring

testimony pursuant to consistency provisions, and made clear that "the use of such tainted testimony is a denial of the fundamental right to a fair trial in violation of federal constitutional principles." *Garrison*, 765 P.2d at 428; *see also Allen*, 729 P.2d at 130-31. The presence of general truthfulness provisions was irrelevant to the court's analyses.

b. Nothing in *Jenkins* backed away from these holdings. *Jenkins* did not even involve a consistency provision. Rather, the issue there was whether the prosecution may present an accomplice's testimony while charges are pending against him. The California Supreme Court held that it may do so. The court also reaffirmed *Allen*'s determination that presenting an accomplice's testimony under a plea agreement that requires him to testify "in conformity with an earlier statement to the police . . . would place the witness under compulsion inconsistent with the defendant's right to fair trial." *Jenkins*, 997 P.2d at 1120 (citing *Allen*, 729 P.2d at 130-31).

2. *Kansas.* The State concedes that the Kansas Supreme Court's decision in *State v. Dixon*, 112 P.3d 883 (Kan. 2005), "conflicts" with the Illinois Supreme Court's here, because it holds that presenting testimony under a plea agreement just like the one here violates due process. BIO 16. The State suggests, however, that it is "uncertain" whether *Dixon* is good law because the Kansas Supreme Court "relied" in part on Arizona decisions that the Arizona Supreme Court had recently "overturned" in *State v. Rivera*, 109 P.3d 83 (Ariz. 2005). BIO 15-16. This argument fails to withstand scrutiny.

The Kansas Supreme Court in *Dixon* surveyed cases from other jurisdictions only for their

persuasive value, not because it felt bound by them. *See* 112 P.3d at 917. Thus, even if the Arizona Supreme Court had shifted its attitude towards consistency provisions in *Rivera*, there would be no reason to believe that the Kansas Supreme Court would have found such a change significant. Indeed, in the five years since *Dixon* was announced, no Kansas court has questioned *Dixon*'s categorical holding that presenting testimony subject to a consistency provision violates the Due Process Clause.

At any rate, nothing in *Rivera* undermined – much less "overruled" – the Arizona Supreme Court's earlier decision in *State v. Fisher*, 859 P.2d 179, 184 (Ariz. 1993), that its state law prohibits the prosecution from including consistency provisions in plea agreements. The accomplices' plea agreements in *Rivera* "did not expressly condition the agreements upon the testimony at trial being consistent with the prior statements." 109 P.3d at 86. Instead, the agreements simply recited an avowal from each witness that their prior statements had been truthful. *Id.* at 84. The Arizona Supreme Court explained that such an avowal "is not the same as requiring [a witness] to testify consistently with [a] specific version of the facts" – something that Arizona law still "does not allow." *Id.* at 86-87.

3. *Court of Military Appeals.* The State argues that decisions from the U.S. Court of Military Appeals (now the Court of Appeals for the Armed Forces) forbidding testimony under consistency provisions do not conflict with the Illinois Supreme Court's because (a) they do not rest on due process grounds; and (b) the agreements in those cases

"lacked truthfulness provisions." BIO 14. Neither assertion is convincing.

a. The Due Process Clause prohibits the prosecution from introducing testimony that causes a "corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 104 (1976); *see also Estes v. Texas*, 381 U.S. 532, 540 (1965) (due process prohibits practices that interfere with "the solemn purpose of endeavoring to ascertain the truth"). The Court of Military Appeals, in turn, has held that presenting testimony pursuant to consistency provisions "detract[s] from the quest for truth" and "pollut[es] . . . the stream of justice." *United States v. Stolz*, 14 C.M.A. 461, 464-65 (1964); *see also United States v. Gilliam*, 23 C.M.A. 4, 8 (1974). While these decisions do not recite the words "due process," the inescapable import of their reasoning is that presenting testimony subject to consistency provisions violates due process.

b. The State's assertion that the agreements in those cases "lacked truthfulness provisions," BIO 14, is most likely inaccurate and is, in any event, irrelevant. Neither *Stolz* nor *Gilliam* describes the agreements involved as lacking truthfulness requirements. What is more, standard practice among prosecutors is to include language requiring truthful testimony. *See* Br. of Center on the Administration of Criminal Law 6-7. It is therefore entirely likely that the agreements in *Stolz* and *Gilliam* contained truthfulness language, but the Court of Military Appeals neglected to mention that fact because it was so unremarkable.

At any rate, the Court of Military Appeals' reasoning makes clear that any truthfulness requirements would have been irrelevant to its holdings in *Stolz* and *Gilliam*. Even if the plea agreements in those cases had somehow lacked general truthfulness provisions, the accomplices in those cases would have taken oaths at trial requiring truthfulness. Yet the court deemed their testimony inadmissible, explaining that the prosecution can present accomplice testimony subject to a plea agreement only when the witness understands that he is to "testify *only* truthfully." *Gilliam*, 23 C.M.A. at 8 (emphasis added). The legal deficiency in those cases, therefore, arose because of the addition of consistency provisions to the plea agreements, not because of the absence of truthfulness provisions.

5. *Nevada*. The Nevada Supreme Court's holding in *Franklin v. State*, 577 P.2d 860 (Nev. 1978), plainly prohibits testimony subject to a consistency provision. And the State does not dispute that the Nevada Supreme Court's subsequent decision in *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197 (Nev. 1991), which cut back on broader postulates in *Franklin*, left that decision intact to the extent it forbids the prosecution from introducing testimony "where the bargain [itself] compels the witness to provide particularized testimony." BIO 17 (quoting *Acuna*, 819 P.2d at 201). The State contends, however, that "*Acuna* was speaking in the context of plea agreements that require only consistent testimony and not that the testimony also be truthful." BIO 17-18.

This is fanciful thinking. *Acuna* did not even involve a consistency provision. Rather, the issue

there was whether the prosecution could present accomplice testimony under an ordinary plea agreement while withholding the benefit of the bargain until after trial. 819 P.2d at 198. Consequently, the *Acuna* court had no occasion to disturb *Franklin*'s conclusion that "testimony becomes 'tainted beyond redemption' where the accomplice is placed under compulsion to testify in a particular fashion in order to receive the benefits of his plea bargain." *Franklin,* 577 P.2d at 862. If anything, *Acuna* reinforced that due process rule by signaling (as the State itself points out, BIO 18) that it agreed with California jurisprudence on the subject. *See* 819 P.2d at 201.

Even if *Acuna* had opened the door, at least under certain circumstances, to testimony subject to consistency provisions, the Nevada Supreme Court would not have allowed the testimony at issue here. That court's subsequent decision in *Leslie v. State*, 952 P.2d 966, 973 (Nev. 1998), requires the prosecution to have "[c]redible evidence" corroborating an accomplice's testimony before it may introduce such testimony under *any kind of plea bargain* that might lead him to feel compelled to testify in a particular way. Here, no other evidence corroborated the prior statements that Johnson's consistency provision required him to repeat at trial. Indeed, Johnson had previously made other statements under oath that directly contradicted those the State insisted that he repeat. Pet. 3, 5. Thus, the Nevada Supreme Court would have held that admitting Johnson's testimony violated due process.

II. The Illinois Supreme Court's Decision Is Incorrect.

The State does not dispute that due process prohibits the prosecution from presenting testimony that interferes with a witness's oath to tell the whole truth or that impedes the jury's fact-finding function. The State asserts, however, that presenting testimony subject to consistency provisions does neither of these things. The State's argument flouts logic as well as common sense.

1. Notwithstanding the fact that the State insisted here upon a consistency provision, it now contends that other provisions in plea agreements (including the agreement here) that require present and past truthfulness "provide[] the same alleged incentive" as consistency provisions for a witness "to testify consistently with his earlier statements." BIO 20. Not so.

a. A consistency provision "override[s]" a standard requirement in a plea agreement to testify truthfully at trial – not the other way around.

The plea agreement in this case illustrates the point. The general truthfulness provision required the accomplice to "testify truthfully." Pet. App. 68a. The very next sentence (the consistency provision) provided that "[s]uch truthful testimony shall be consistent with" certain specified statements the accomplice previously made to law enforcement. *Id.* The consistency provision thus set the parameters for what the State would accept as the "truth." It defined the term "truthful," in other words, in a manner that precluded from being considered

truthful even accurate testimony that deviated from the statements the State specifically selected.

Even apart from the strictures of contract interpretation, common sense dictates that a witness testifying under the force of a consistency provision will be guided far more by that provision than a general truthfulness provision alongside it. As prosecutors themselves frequently attest, "truth is elusive." Br. of Center on the Administration of Criminal Law 12; *see also* Pet. App. 28a (dissenting opinion) ("[T]he State has no crystal ball to know what the 'truth' is."). Consistency, by contrast, is a concept that is far more amenable to verification and enforcement. Accordingly, an accomplice who testifies untruthfully but consistently with prior statements the prosecution selected knows he will most likely retain the benefit of his bargain, while an accomplice whose truthful testimony diverges from such statements knows he will certainly not.

Even when a consistency provision binds a witness to a truthful pretrial statement, the provision interferes with the witness's oath at trial by impeding the normal process of recollection and adjustments as questioning stirs one's memories. A plea agreement requiring a witness to testify only truthfully encourages the witness at trial to remember and to convey "what happened." A plea bargain, however, that requires a witness to give testimony that is not only truthful but consistent with a prior unsworn statement forces him to perform an entirely different mental task – to focus on, and to repeat, what he *said* happened in his prior statements to the police. This explicit shift in testimonial motivation cannot be squared with the

oath, required since the inception of our Republic, to tell the whole truth.

b. Nor does the additional presence of a provision voiding an accomplice's plea agreement if his prior statements to law enforcement are "found to be false," Pet. App. 70a, provide the same incentive to prioritize consistency over accuracy that a consistency provision does. As the Arizona and California Supreme Courts have recognized, provisions requiring past truthfulness "allow a witness who has truthfully recounted the facts before trial to nonetheless truthfully recount the facts at trial in a manner not fully consistent with her previous statements – as a result, for example, of new information or refreshed recollection." *Rivera*, 109 P.3d at 87; *see also Garrison*, 765 P.2d at 429-30 (distinguishing past truthfulness provisions from consistency provisions). A consistency provision, by contrast, precludes this sort of deviation from prior statements.

The State attempts to dismiss this reality by suggesting that any trial testimony that violates a consistency provision but not an agreement simply requiring past and present truthfulness would not vary significantly enough from an accomplice's prior statements to "affect[] the outcome" of a case. BIO 19. But the State cannot arbitrate in advance what variations in testimony might create reasonable doubt. If an accomplice describes various details of an incident differently at trial than in pretrial statements, this divergence might not singlehandedly demonstrate dishonesty, but it may signal to the jury that the witness's purported recollection may be inaccurate. Because the State cannot know what

kinds of inconsistencies might affect a jury, it cannot insist on a contract that has the effect of preventing their disclosure.

In the end, nothing undercuts the State's arguments more than its own actions: If, as the State now asserts, provisions requiring past and present truthfulness actually prevented consistency provisions from having any impact, then no prosecutor would ever have any reason to include a consistency provision in any accomplice's plea agreement. Yet the State went out of its way to insist upon such a provision here – in a case it knew would stand or fall according to the accomplice's testimony and in which the accomplice had provided a menu of pretrial statements, only some of which aided the State. This indicates that the State itself thought the provision would influence the accomplice's testimony.

2. As the Petition for Certiorari explained, this Court has never suggested that an opportunity for cross-examination can cure prosecutorial interference with the truth-seeking function of trial. *See* Pet. 26 (citing *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam)). The State nonetheless suggests that disclosing the presence of a consistency provision and allowing a defendant to cross-examine the accomplice about it prevents the provision from impeding the jury's fact-finding function. BIO 22-23.

If anything, insisting upon disclosure and cross-examination exacerbates the due process problem with presenting testimony subject to consistency provisions. Settled "vouching" jurisprudence precludes the prosecution from apprising the jury of a

plea agreement's terms when they imply prosecutorial knowledge of the truth. *See* Pet. 26-27 (citing cases); *State v. Ish*, ___ P.3d ___, 2010 WL 3911355, at *5 (Wash. Oct. 7, 2010). As Judge Friendly expressed the concern on which this line of authority is based, "giv[ing] jurors the impression that the prosecution is carefully monitoring the testimony of the cooperating witness to make sure that the latter is not stretching the facts" conveys prosecutorial certitude that not only is unrealistic but also intrudes upon the fact-finding role of the jury. *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1150 (2d Cir. 1978) (concurring opinion).

The State protests that revealing the existence of a consistency provision must be acceptable because the prosecution always "implicitly" signals to the jury that it believes its witnesses are telling the truth. BIO 23. But a consistency provision does much more: it *explicitly* tells the jury that the accomplice's specified prior statements (and his in-court testimony repeating them) are "truthful." Pet. App. 68a. In addition, it does so in a context in which the defendant is unable to call the prosecution as a witness to ask how it determined that those statements were "truthful" or why it thought a consistency provision was necessary to persuade the accomplice to convey that "truth[]" at trial. It thus is fundamentally unfair to allow the prosecution to reveal a consistency provision to the trier of fact – or to require a defendant to reveal such a provision in order to challenge the State's star witness against him.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
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BRIEF OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, the Center on the Administration of Criminal Law at New York University School of Law ("The Center" or "Amicus"), with the consent of all parties, respectfully submits this brief of *amicus curiae* in support of Petitioner James Bannister.[1]

INTEREST OF *AMICUS CURIAE*

The Center on the Administration of Criminal Law is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. Although prosecutorial discretion is a central feature of criminal enforcement at all levels of government, there is a dearth of scholarly attention as to how prosecutors actually exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decision-making. The Center's litigation program aims to bring the Center's empirical research and experience with criminal justice and prosecution practices to bear in important criminal justice cases in state and federal courts, at all levels. The Center focuses on cases in which the exercise of prosecutorial

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. The parties consented to the filing of this brief, and letters reflecting such consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

discretion raises significant substantive legal issues and files briefs in support of defendants and the government.

The Center files this amicus brief out of concern that the decision of a deeply-divided Illinois Supreme Court in *People v. Bannister*, upholding the use of so-called "consistency provisions" in plea agreements, is incompatible with the fair administration of justice, for the reasons set forth herein.

SUMMARY OF THE ARGUMENT

"The 'ultimate goal' of the criminal justice system is 'truth and justice.'" *Stone v. Powell*, 428 U.S. 465, 523 (1976). The use of "consistency provisions" in plea agreements—which require cooperating witnesses to testify consistently with their pre-trial statements in order to obtain the benefit of immunity or the possibility of a reduced charge or sentence—undermines this overarching goal.

Petitioner's brief argues that consistency provisions in plea agreements contravene this Court's Due Process jurisprudence by interfering with the witness's oath to tell the whole truth, and by impeding the ability of the jury to determine the truth for itself. (Pet. Br. 19.) Amicus submits this brief, in support of Petitioner, to explain further how the use of consistency provisions subverts the search for truth.

Although the testimony of an accomplice-turned-cooperator is often crucial to the prosecution of a case, it also presents the risk that it is untruthful and solely the product of the cooperator's strong incentive to obtain leniency from the government. Recognizing both the importance and challenges of cooperator testimony, our legal system has put in place a number of measures to seek

to minimize the inherent issues posed by reliance on cooperator testimony. Consistency provisions serve only to undermine such safeguards. First, consistency provisions are necessarily in tension with truth-telling provisions, which are typically included in plea agreements. Under well-established principles of contract interpretation, a consistency provision must be ascribed meaning and significance, within the context of a plea agreement, that is separate and apart from any truth-telling provisions contained in the same agreement. Thus, the only independent effect and meaning that a consistency provision may have within a plea agreement is to compel a cooperating witness to testify in a way that differs from the testimony he or she otherwise would provide if his or her plea agreement contained only standard provisions requiring truthful testimony. Moreover, by pre-determining the content of a witness's testimony based on a prosecutor's own evaluation of the truthfulness of those statements, consistency provisions also run counter to a witness's oath to tell the truth and the role of a neutral fact-finder as the sole determiner of the truth. Thus, consistency provisions undermine "'the truth-seeking function of trials.'" *Gray v. Netherland*, 518 U.S. 152, 185 (1996) (quoting *Gardner v. Florida*, 430 U.S. 349, 360 (1977)).

Only an approach to cooperator testimony that solely requires and emphasizes truth serves the interest of justice. Research confirms the challenges presented by cooperating witnesses—regarding the incentive and potential ability of cooperators to embellish or even fabricate truth, as well as the difficulties in detecting such deception. Even a prosecutor's ethical duties, and good-faith belief that a cooperator who testifies "consistently" is

testifying "truthfully," cannot counterbalance the ineluctable negative effects of consistency provisions.

The Center respectfully submits that the petition for certiorari should be granted because judicial sanction of consistency provisions—as the Illinois Supreme Court has granted in this case—will weaken key tenets central to the fair administration of justice.

ARGUMENT

I. CONSISTENCY PROVISIONS UNDERMINE THE SAFEGUARDS PUT IN PLACE TO MITIGATE THE RISKS AND CHALLENGES POSED BY COOPERATOR TESTIMONY

"[C]ourts have countenanced the use of informers from time immemorial [because] it is usually necessary to rely upon [informers] or cooperators." *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1950). Cooperators, especially when corroborated by other evidence, are an essential part of the criminal justice system and often are invaluable—even necessary—for the prosecution of a case. For example, the United States Attorney's Manual ("USAM") notes that: "In many cases, it may be important to the success of an investigation or prosecution to obtain the testimonial or other cooperation of a person who is himself/herself implicated in the criminal conduct being investigated or prosecuted." USAM 9-27.600(B)(1). However, that cooperator testimony is only acceptable to the extent that it is true and, as the studies discussed below illustrate, deception may be difficult to detect.

The potential risks and challenges posed by cooperator testimony—which is the result of a bargain for

leniency—are well-recognized. *See Commonwealth of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1123-24 (9th Cir. 2001) (noting that "[o]ur system long ago recognized and embraced" the "kind of favoritism" granted to cooperators—who "purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration"—because "given our strict and demanding constitutional mandates and rules of evidence, not to do so would insulate many vile and dangerous outlaws from the reach of the law," but further acknowledging that "because of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to 'get' a target of sufficient interest to induce concessions from the government").

In light of the often critical importance of the testimony of cooperators to the prosecution of a case, and the concomitant risks such reliance may pose, our legal system has a number of safeguards that aim to minimize the potential for untruthful testimony. Plea agreements typically include and are conditioned upon the requirement that the defendant or cooperator testify truthfully and completely. This requirement furthers the testimonial oath to tell the truth. Moreover, the cooperator is subjected to cross-examination. In addition, closing arguments may be made, and jury instructions may be provided, that identify the possibility of self-interest. And, ultimately, the determination of a witness's credibility, and the assessment of the weight given his or her testimony, is left solely to the judgment of a neutral fact-finder. Consistency provisions

are inherently in tension with these safeguards, and thereby undermine the truth-seeking function of our legal system.

A. Plea Agreements Typically Use Truth-Telling Provisions

"The government has an obligation to ensure that cooperating witnesses testify truthfully." *United States v. Hartwell*, 448 F.3d 707, 719 (4th Cir. 2006). In line with this obligation, cooperation agreements are typically conditioned upon standard truth-telling provisions requiring the defendant or cooperating witness "to testify truthfully and completely before the grand jury and at any subsequent trials." *Bischel v. United States*, 32 F.3d 259, 261 (7th Cir. 1994) (noting that the plea agreement at issue included this "standard language"); *see also Hodge v. United States*, 554 F.3d 372, 374 (3d Cir. 2009) (discussing a plea agreement conditioned upon truthful, complete, and accurate testimony); *accord United States v. Cruz-Mercado*, 360 F.3d 30, 37 (1st Cir. 2004); *United States v. El-Gheur*, 201 F.3d 90, 92 (2d Cir. 2000); *United States v. Floyd*, 1 F.3d 867, 868 (9th Cir. 1993); *United States v. Crisp*, 817 F.2d 256, 258 (4th Cir. 1987); *Charbonneau v. State*, 904 A.2d 295, 302 (Del. 2006); *Commonwealth v. Miller*, 819 A.2d 504, 521 (Pa. 2002); *State v. Bolden*, 979 S.W.2d 587, 591 (Tenn. 1998); *State v. Marshall*, 690 A.2d 1, 38 (N.J. 1997); *Sessions v. State*, 890 P.2d 792, 795 (Nev. 1995); *People v. Rosenblum*, 218 A.D.2d 823 (N.Y. App. Div. 1995); *People v. Fauber*, 831 P.2d 249, 264 (Cal. 1992); *Commonwealth. v. Ciampa*, 547 N.E.2d 314, 319 (Mass. 1989); *State v. O'Connor*, 378 N.W.2d 248, 252 (S.D. 1985); *State v. Rivest*, 316 N.W.2d 395, 400 (Wis. 1982).

Furthermore, Section 9-27.630 of the United States Attorney's Manual provides that, "[t]o further encourage

full disclosure by the witness, it should be made clear in the agreement that the government's forbearance from prosecution is conditioned upon the witness's testimony or production of information being complete and truthful, and that failure to testify truthfully may result in a perjury prosecution." USAM 9-27.630.[2] Perhaps unsurprisingly, therefore, the USAM does not sanction—or even refer to—using consistency provisions in plea agreements.

B. Consistency Provisions Are Inherently in Tension with Truth-Telling Provisions in Plea Agreements

Plea agreements are essentially contracts and should be construed accordingly. *See Pucket v. United States*, 129 S.Ct. 1423, 1430 (2009); *see also People v. Evans*, 174 Ill.2d 320, 327 (Ill. 1996) (finding questions related to negotiated plea agreements "appropriate for the application of contract law principles"). The primary goal of contract interpretation is to give effect to the parties' intent. *McHenry Sav. Bank v. Autoworks of Wauconda, Inc.*, 924 N.E.2d 1197, 1205 (Ill. App. Ct. 2010) (citation omitted). When construing the terms of a contract, it is "presumed[d] that each contractual provision was inserted deliberately and for a purpose consistent with the parties' intent." *Id.* "Meaning and effect are to be given to all terms and provisions of a contract" because it is presumed that "language was not employed idly." *State Farm Mut. Auto. Ins. Co. v. Schmitt*, 419 N.E.2d 601, 603 (Ill. App. Ct.

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[2] *See also* Federal Public Defender's Office, Western District of New York, *available at* http://nyw.fd.org/cja/plea.pdf (example of a federal plea agreement form containing truth-telling provisions but no consistency provision) (last visited July 27, 2010).

1981). Therefore, a contract should be read in a manner that gives effect to all the provisions of the contract. *McHenry Sav. Bank*, 924 N.E.2d at 1205. Under these well-established principles of contract interpretation, a consistency provision must be ascribed meaning and significance, within the context of a plea agreement, that is separate and apart from any truth-telling provisions contained in the same agreement. Any other interpretation would improperly write out the consistency provision from the plea agreement.

Here, the plea agreement that the cooperator Michael Johnson entered into required him to "testify truthfully in all matters regarding the 1st Degree Murders of Dan Williams and Thomas Kaufman" but also required that "[s]uch truthful testimony *shall be consistent* with Michael Johnson's post-arrest statements." (Pet. App. 68A (emphasis added).) Under well-established principles of contract interpretation, the provision requiring that Mr. Johnson's testimony be "consistent" with his post-arrest statements must be understood to have meaning and effect that is different from the provision requiring that Mr. Johnson "testify truthfully in all matters regarding the 1st Degree Murders of Dan Williams and Thomas Kaufman." Courts must ascribe independent meaning and significance to this separate consistency provision. While the truth-seeking function of the criminal justice system is advanced by the provision requiring that a cooperator such as Mr. Johnson testify truthfully, the consistency provision conflicts with and negatively affects the truth-seeking function. If a cooperator, such as Mr. Johnson, is presented with a choice between testifying truthfully at trial or testifying consistently with his post-arrest statements—or, in Mr. Johnson's case, only *certain* of his post-arrest

statements—he will be incentivized to testify consistently in order to appear to comply with the terms of his plea agreement and obtain the considerable benefit of his bargain, even if such testimony is false. Thus, the consistency provision thwarts the truth-seeking function of the criminal justice system.

Moreover, the mere disclosure at trial of a consistency provision contained in a plea agreement is not sufficient to counteract these deleterious effects and justify the use of such a provision. Disclosing the consistency provision to the fact-finder has no effect on the cooperator's incentive to provide testimony that is consistent with his or her prior statements, yet false. And even if cross-examination might sometimes expose false cooperator testimony, the fact that consistency provisions serve no beneficial purpose to the criminal justice system's truth-seeking efforts means that they should not be condoned.

C. Consistency Provisions Undermine Other Fundamental Safeguards Of Our Judicial System

By binding cooperators to certain pre-trial statements that may be false, consistency provisions weaken fundamental safeguards of our legal system. As the Supreme Court of Illinois recognized in this case, "[o]ur legal system tests a witness' credibility through cross-examination and leaves the determination of that credibility to the finder of fact." *People v. Bannister*, 923 N.E.2d 244, 253 (Ill. 2009). Also crucial to the fact-finding process at trial, and to the efficacy of cross-examination itself, is a witness's oath to tell the truth. *See California v. Green*, 399 U.S. 149, 158 (1970) (noting that requiring a witness to

give his statements under oath "impress[es] him with the seriousness of the matter and guard[s] against the lie by the possibility of a penalty for perjury" and further emphasizing that cross-examination, under oath, is "the greatest legal engine ever invented for the discovery of truth") (internal quotation marks omitted). Consistency provisions, however, undermine the witness's taking of an oath to tell the truth. If the witness's prior, pre-trial statements are in fact not truthful, a provision requiring him or her to testify at trial consistently with those prior statements unavoidably conflicts with the witness's oath (and with the standard truth-telling provision typically included in a plea agreement). Thus, a consistency provision provides an added incentive for and pressure on a witness to testify falsely at trial. Perhaps more subtly pernicious, consistency provisions undermine the fact-finder's role of evaluating a witness's credibility. Such provisions pre-limit the testimony a witness will give before the fact-finder. Even a cooperator testifying truthfully, but constrained by previous statements, will be reluctant to provide supplementary truthful information at trial for fear that a prosecutor could deem it inconsistent and revoke the agreement. The safeguards put in place at trial were not built to—and do not—avoid these difficulties. Thus, consistency provisions subvert crucial tenets of our legal system.

II. ONLY AN APPROACH TO COOPERATOR TESTIMONY WHICH INSISTS EXCLUSIVELY UPON TRUTH SERVES THE INTEREST OF JUSTICE

A cooperator's self-interested incentive to acquire leniency, and to tailor facts to minimize his or her own

culpability, motivates testimony that fits the prosecutor's theory of the case and helps to convict someone else. *See* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepp. L. Rev. 1, 50 (2000) ("Every defendant or target of an investigation knows that her only possibility of making a deal with the government for lenient treatment is a proffer of testimony helpful in convicting another defendant or target."); R. Michael Cassidy, *"Soft Words Of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L. Rev. 1129, 1140 (2004) (noting that prosecutors report that "[a]ccomplice witnesses are very eager to please the government, precisely because they perceive that their future liberty and safety depend on it").

There is always a risk that such testimony may not be truthful. *See* Stephen S. Trott, *Words of Warning for Prosecutors Using Criminal as Witnesses*, 47 Hastings L.J. 1381, 1383, 1432 (1996) (concluding that "using informers is both central and extremely perilous to many prosecutions" and explaining that one of the two principal reasons prosecutors should be especially wary in using informers is that "[c]riminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law"). In some instances, as noted by one former Assistant United States Attorney ("AUSA") interviewed (along with a number of others in a survey about the use of cooperator testimony), "'[i]t is not that [the cooperator] thinks he's fabricating information[;] [h]e's just eager to please.'" Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917, 943 (1999). As noted by another former AUSA: "Many [cooperators] come in believing

This Is What They Want To Hear Time rather than This Is What Happened Time. Thus, the last thing you want to do is to feed them information because they will believe you want them to parrot back that information." *Id.* at 955. In a particularly candid assessment, a former chief of the Criminal Division in the United States Attorney's Office for the Southern District of New York responded as follows when asked whether he believed cooperators embellish the truth:

> All I know is that truth is elusive. Everyone tells you things and people don't even know if they are embellishing. The greater the incentive structure, the greater the risk of incriminating others. How much do you really remember? Mistakes and concurrences vary and now, if you tell them to a partisan lawyer and it fits the theory, it becomes frozen in the story because it is useful. The client is alert. His ears pick up when he reveals certain facts that pique the prosecutor or agent.

Id. at 953. Similarly, another former AUSA—who is now chief of staff to the New York Attorney General—recounted that "most prosecutors candidly admit that they are aware of instances in which cooperators have lied and the lies have gone undetected long enough to have an impact on the investigation." Steven M. Cohen, *What Is True? Perspectives of a Former Prosecutor*, 23 Cardozo L. Rev. 817, 824 n.16 (2002). And, whatever its frequency, studies illustrate that false cooperator testimony can have profound consequences. A 2004 study by the Northwestern University Center on Wrongful Convictions found that of the more than one-hundred death-row inmates who have

been exonerated since 1973, 45.9% were initially convicted at least in part on the testimony of cooperating witnesses. *See* Northwestern University School of Law Center on Wrongful Convictions, *The Snitch System*, 3 (2005).

The risk of untruthful testimony can be compounded by the fact that "[a]ccomplices can manipulate their versions of events without arousing much suspicion precisely because they are immersed in the details of the crime and know which aspects of the enterprise are verifiable and which are not." Cassidy, *supra*, at 1140. Indeed, the more critical the role played by cooperators in a case, the more difficult it may be to gauge the cooperator's truthfulness. As noted by a former AUSA: "For obvious reasons, when there is little information in the possession of (or available to) the prosecutor, the defendant's value as a cooperator increases. Unfortunately, that very lack of evidence tends to make it much more difficult to evaluate the veracity of the would-be cooperator." Cohen, *supra*, at 822. In such situations, "the prosecutor is forced to rely to a greater extent on his 'gut reaction' than on tangible evidence. How successful are prosecutors in relying on their 'gut reactions' when assessing would-be cooperators? The answer is unclear." *Id.* Thus, the use of cooperating witnesses "is laden with risk." *Id.*

Indeed, research demonstrates the difficulties in detecting deception. *See, e.g.*, Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 Cardozo L. Rev. 809, 809 (2002) (discussing empirical research by social psychologists and noting that based on dozens of studies the "compelling pattern emerges" that "people are poor human lie detectors") (citing Bella M. DePaulo et al., *The Accuracy-Confidence*

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JAMES BANNISTER,
Petitioner,

v.

ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Illinois Supreme Court

BRIEF OF THE INNOCENCE NETWORK AND THE INNOCENCE PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus the Innocence Network is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The Innocence Network currently has 56 members, who represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[2] The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent individuals, the Innocence Network promotes further study and advocates reform to improve the truth-seeking functions of the criminal justice system in an effort to prevent future wrongful convictions.

Amicus the Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and to reforming the criminal justice system to prevent future injustice. The Innocence Project was created by Barry C. Scheck and Peter J. Neufeld in 1992 and is a non-profit legal clinic af-

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief. We have filed their consent letters with the Clerk of the Court.

[2] The member entities are listed in the Appendix

filiated with the Benjamin N. Cardozo School of Law at Yeshiva University. As a result of the Innocence Project's efforts, DNA testing has been used to exonerate 255 innocent individuals who spent a combined 3,245 years incarcerated for crimes they did not commit. The Innocence Project works to reform the criminal justice system by crafting legislation to increase access to post-conviction DNA testing, proposing reforms to improve the accuracy of eyewitness identification, and working to establish national standards in forensic science.

The Innocence Network and the Innocence Project have a direct interest in stopping the use of consistency provisions, which plainly increase the likelihood of wrongful convictions, and therefore respectfully file this *amici curiae* brief in support of James Bannister's petition for certiorari.

SUMMARY OF ARGUMENT

The goal of the Innocence Network and the Innocence Project is a world without wrongful convictions. To that end, *amici* are committed to assuring that the judicial process functions in such a way that only the guilty are incarcerated. Informant or "snitch" testimony, of the kind at issue in this case, is a primary cause of wrongful convictions. We estimate that in more than 15% of cases of wrongful conviction overturned by DNA testing, an informant or jailhouse snitch testified against the defendant.

Consistency provisions are clauses in plea agreements in which cooperators or informants agree to testify to a specific version of events satisfactory to the prosecutor, in exchange for certain preferential treatment. The use of consistency provisions exacerbates the dangers of cooperator testi-

mony, violates defendants' rights to a fair trial, and should be stopped. Testimony from informants who have agreed with prosecutors to testify consistently with a certain version of the facts in exchange for certain treatment will exacerbate the inherent problems of informant testimony, obscure the search for truth, and increase wrongful convictions. The Innocence Network and the Innocence Project submit this brief in support of Petitioner and urge the Supreme Court to grant certiorari to review the constitutionality of prosecutors' use of consistency provisions in plea agreements that contractually bind witnesses to give particular testimony at a criminal trial.

ARGUMENT

As demonstrated in James Bannister's petition for a writ of certiorari, consistency provisions have been used in jurisdictions across the country, particularly in those cases in which there is reason to believe the cooperating witness is unreliable. If the Supreme Court does not grant certiorari, prosecutors in states that allow the provisions will have a green light to use consistency provisions in future plea agreements to ensure that informants – particularly those who have given inconsistent statements in the past – do not change their stories when they testify in court. As some jurisdictions already prohibit consistency provisions, these injustices will be perpetrated unevenly across the United States. Certiorari is appropriate to prevent the injustice, and inconsistent justice, of this result.

A. INFORMANT TESTIMONY IS INHERENTLY UNRELIABLE AND THE USE OF SUCH TESTIMONY CAN HAVE DANGEROUS CONSEQUENCES

It is well established that testimony by police informants and cooperating witnesses is problematic. A comprehensive study in 2005 by the Center on Wrongful Convictions found that testimony provided by informants who have incentives to lie accounted for 45.9% of wrongful convictions in the cases studied, and was the leading cause for sentencing innocent people to death.[3] Additionally, the Illinois Commission on Capital Punishment reported in 2002 that many in-custody informant testimonies were not credible and led to wrongful convictions.[4] These findings are hardly surprising – co-

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[3] Rob Warden, Nw. Univ. Sch. of Law Ctr. on Wrongful Convictions, The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row (2004-05) ("Snitch System") 3, available online: <http://www.law.northwestern.edu/wrongfulconvictions>. *See also*, Barry Scheck et al., Actual Innocence: When Justice Goes Wrong and How to Make it Right 246, 361 (2001) (finding informants involved in 21% of the 62 exonerations examined and noting that, out of the first 74 DNA exonerations, 19% of the convictions involved "informants/snitches"); Samuel R Gross et al , *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. & Criminology 523, 543-44 (2005) (noting that, out of 340 exonerations, at least 97 cases involved perjury by a "jailhouse snitch" or another witness who stood to gain from the false testimony); Brandon L. Garrett, *Judging Innocence*, 108 Colum. L Rev. 55, 76, 86 (2008) (examination of the causes of error in the first 200 DNA exonerations shows that false informant testimony was involved in 18% of those cases).

[4] George H. Ryan, *Report of the Governor's Commission on Capital Punishment*, Apr. 15, 2002, p. 122, available online:

operators and informants are *both* highly motivated to curry favor with prosecutors in order to gain preferential treatment, *and* convicted criminals themselves who may not necessarily place a high value on telling the truth to law enforcement officials.

The Innocence Project has helped exonerate dozens of innocent individuals who were wrongfully convicted based on informant and cooperator testimony that was later found to be untruthful. The stories of these exonerees bear striking similarities to James Bannister's story and illustrate the often tragic consequences of allowing prosecutors to rely on informant testimony.

Dennis Williams was exonerated after 17 years on death row. Williams was convicted in Illinois in 1978 and sentenced to die for the rape of a young woman and the murder of her and her fiancé. Williams and his three friends and codefendants lived near the crime scene and were seen on the street the night of the crime.

The State's chief witness in the case was a 17-year-old named Paula Gray who claimed to have been at the scene of the crime with Williams and his friends. After her testimony secured indictments of all four men, she recanted her incriminating testimony against the four men and the charges against one of the other defendants were dropped. Williams won a new trial in 1985. Gray, who had been convicted as an accomplice and for perjury after her recantation, reverted to her original story and testified against Williams. He was again convicted.

<http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf>.

A group of journalism students began examining Williams's case in 1996. They found a witness who had tipped police to the identity of the real killers shortly after the crime, but whose tip was never investigated. The students also tracked down two of the men guilty of the crime, who eventually confessed. DNA testing corroborated the confessions and showed that Gray's cooperating testimony against Williams was entirely false. Williams was released in 1996 after 17 years of wrongful incarceration.

Like Williams, James Bannister has already had one verdict overturned. Like Williams, Bannister's second conviction is based on cooperator testimony of an alleged accomplice whose story changed repeatedly over the years.

In 1986, Dennis Halstead, John Restivo, and John Kogut were convicted of the rape and murder of a 16-year-old girl on the basis of Kogut's confession, which implicated the other men. Kogut later recanted, and DNA evidence proved that they were all innocent. The three men were exonerated in December 2005, after nearly 19 years of wrongful incarceration. Again, Bannister similarly is convicted solely on the basis of inconsistent, alleged accomplice testimony.

Analogous cases involving false alleged accomplice testimony are myriad: Marcellius Bradford, Larry and Calvin Ollins, and Omar Saunders were convicted of the 1986 kidnapping, rape, and murder of a 23 year-old medical student in Chicago on the basis of Bradford's confession implicating the men. Bradford later recanted his statements, saying police coerced him into falsely confessing and

that he falsely implicated his codefendants to avoid his own life sentence.

In 1986, Arthur Mumphry was convicted of the rape and murder of a 13-year-old girl and spent nearly 18 years in prison based on the testimony of an alleged accomplice who testified in exchange for a more lenient sentence. After Mumphry spent nearly two decades in prison, DNA evidence revealed that the alleged accomplice's testimony was false and Mumphry was innocent.

Bruce Nelson was convicted of rape and murder based on the confession of Terrence Moore, who implicated Nelson as the instigator of a robbery scheme. After serving nine years in prison, DNA evidence revealed that the alleged accomplice's testimony was false and Nelson was released from prison.

This Court has long recognized that relying on statements from cooperating co-defendants (like those at issue in this case) can be particularly problematic, as these and other stories show. *See Lee v. Illinois*, 476 U.S. 530, 541 (1986) ("truthfinding function of the Confrontation Clause is uniquely threatened" by admission of co-defendant's confession without cross examination); *Bruton v. United States*, 391 U.S. 123, 141 (1968) (co-defendant's statements are "less credible" due in part to his strong motivation to implicate the defendant). Consistency provisions increase these concerns because such provisions prevent the jury from testing the cooperating witness's statements in a meaningful way.

B. Consistency Provisions Exacerbate the Risks of Cooperator Testimony

We already know that cooperators and informants are highly motivated and willing to lie to gain advantageous treatment from law enforcement officers. Countless wrongful convictions (like those described above) demonstrate this. When consistency provisions are used in plea agreements, cooperator testimony is rendered so unreliable as to be intolerable to due process.

First, consistency provisions are typically used only where the witness has given inconsistent statements to law enforcement in the past. This means that by definition a consistency provision witness has at one time or another been willing to lie (or at least has been mistaken) in his statements to investigators. There is thus greater reason than even in the standard cooperator case to believe that the witness may be lying in his inculpatory testimony.

Second, consistency provisions make even more explicit what the witness must do to get the reward he seeks – tell a version of events that is consistent with what he said at some prior point in time. A standard plea agreement merely requires the witness to testify truthfully; the witness is left to determine what that testimony might be. By contrast, where a consistency provision is used, the witness understands perfectly that if he says x, he will receive y. The witness is thus more clearly incentivized to say x than when he is under a standard plea agreement. As noted by the authors of a study on wrongful convictions and informant testi-

mony, "[E]xperience shows pretty much what you would expect – that when the criminal justice system offers witnesses incentives to lie, they will."[5] In this way, the use of consistency provisions magnifies the already significant problems associated with co-operator testimony, so as to violate due process.

C. CONSISTENCY PROVISIONS STRIP DEFENDANTS OF IMPORTANT PROCEDURAL PROTECTIONS, INCREASING THE LIKELIHOOD OF A WRONGFUL CONVICTION

As demonstrated in Petitioner's brief, the use of consistency provisions violates due process by subverting the jury's truth-finding function and undermining the effective cross-examination critical to a fair trial. Through the work of the Innocence Network and the Innocence Project, we well understand that procedural guarantees of fairness can be the difference between the exoneration and conviction of an innocent man, and we therefore comment briefly on these issues as well. The use of consistency provisions prevents criminal defendants from obtaining a full and fair adversarial testing of the relevant facts before a jury.

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[5] Snitch System at 2. Out of the 111 death row exonerations since the 1970s, 45.9% of them involved witnesses with incentives to lie (e g., leniency in their own sentencing). Snitch and informant testimonies constitute the leading cause of wrongful convictions in American capital punishment cases - ahead of erroneous eyewitness identification testimony (25.2%), false confessions (14.4%), and false or misleading scientific evidence (9 9%). *Id.* at 3.

1. CONSISTENCY PROVISIONS INTERFERE WITH THE JURY'S ROLE AS FACTFINDER

"The Constitution recognizes an adversary system as the proper method of determining guilt . . . ." *Singer v. United States*, 380 U.S. 24, 36 (1965). This Court has long recognized that "the maintenance of the jury as a factfinding body in criminal cases is of such importance and has such a place in our traditions" that courts should "avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." *Id.* at 34 (quoting *Patton v. United States*, 281 U.S. 276, 312-13 (1930)). This is because juries are "the tribunal which the Constitution regards as most likely to produce a fair result." *Singer*, 380 U.S. at 36.

The pre-screening and selective presentation – indeed shaping – of certain testimony by the State diminishes the role of the jury to decide what testimony is truthful. Instead, consistency provisions give the prosecutor the power to determine what is truthful and then direct a witness to testify consistently therewith (or be denied preferential treatment). Consistency provisions thus improperly shape what the jury will consider "truthful" and, worse, give such testimony the imprimatur of the government.

In this way, as Petitioner's brief explains, consistency provisions unfairly bolster the credibility of an informant's testimony. A plea agreement listing certain dates and times of "truthful" testimony carries the imprimatur of the government. It

tells the jury that certain statements that the witness made in the past (and on the stand) are truthful – or at the very least that the government believes they are. *See United States v. Young*, 470 U.S. 1, 18-19 (1985). Plea agreements containing consistency provisions are legally binding, written documents, signed by the prosecutor, whose signature makes clear to the jury that it should weigh the testimony given pursuant to the agreement heavily. These factors create a serious risk that the jury will be unduly influenced by the State's blessing of certain statements made by the witness.

2. CONSISTENCY PROVISIONS PREVENT ADEQUATE ADVERSARIAL TESTING OF DISPUTED FACTS

Cross examination of the informant does not provide a sufficient remedy to cure the inherent problems associated with consistency provisions. The right of cross-examination exists "to prevent depositions or *ex parte* affidavits . . . being used against the prisoner *in lieu* of personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Barber v. Page*, 390 U.S. 719, 721 (1968) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

Consistency provisions turn this process on its head. Instead of statements being made, tested, and then appraised by the jury, a wholly different

course is followed. First, several (conflicting) statements are made. The prosecutor then decides which of these statements she finds truthful. The witness agrees in writing that a certain statement is truthful, and, upon penalty of the loss of his deal with the prosecutor, that that statement is the one he will make to the jury. Such a statement is then labeled as "truthful" in a written agreement with the prosecutor. Defendants cannot cross-examine the prosecutor's decision to deem certain prior statements of the witness "truthful." Nor can defendants cross-examine the prosecutor's actual or implied vouching for the truthfulness of a statement given pursuant to a consistency provision.

Consistency provisions undermine the effectiveness of a defendant's right to cross-examine a witness on all of the witness's previous statements. Under the terms of the witness's plea agreement with the government, the witness is compelled to testify consistently with certain statements – admitting that these statements were wrong would undo his deal and cause him to forfeit the benefit of his bargain with the prosecutor.

Moreover, the prior "statement" that is deemed "truthful" by the cooperation agreement may be one the witness himself subsequently denied making (which is indeed the situation in the case at bar). The statement is thus one that was recorded by individuals who are not necessarily witnesses, but are usually police. The police therefore may dictate the "truth" at trial by virtue of how they record or recollect a witness interview. This severely limits the defendant's ability to effectively cross-examine

how this particular version of "the truth" came to be before the jury.

Consistency provisions also impact the substance of the information that witnesses provide to the jury. First, witnesses will likely feel compelled to testify in the same way as directed by the consistency provision even if, once in the courtroom, they remember things differently. Witnesses often testify months, if not years, after speaking with the police or prosecutors, yet their testimony will not reflect any new information or a new understanding of events gained in the intervening time if witnesses must maintain the account previously given to law enforcement.

Second, the defense, through its own investigation and on cross-examination, may introduce new facts to make witnesses consider events in a new way. Coerced fidelity to formerly entered statements prevents witnesses from responding to the new information and testifying completely in light of a new consideration of information or events.

Third, consistency provisions deliberately dull the impact of confrontation. Such provisions signal to witnesses that they need not be entirely forthcoming when under oath in the courtroom, making it more likely that witnesses will continue to tell a predetermined account, fabricated or otherwise. Witnesses are unfairly fortified against the necessary "testing in the crucible of cross-examination" through which "reliability can best be determined." *See Crawford v. Washington*, 541 U.S. 36, 61 (2004).

"[T]he evidence developed against a defendant shall come from the witness stand in a public

courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (internal quotation marks omitted). In effect, where consistency provisions are used, the evidence developed against a defendant is crafted, and the truth is defined, out of the sight of the jury and beyond the defendant's ability to test it. This is contrary to the full and fair adversarial process envisioned by the Constitution.

D. PETITIONER'S CASE PROVIDES AN EXCELLENT OPPORTUNITY TO GRANT CERTIORARI AND PROHIBIT THE USE OF CONSISTENCY PROVISIONS

The record in this case could not be clearer that the linchpin of Petitioner's conviction was the testimony of a single cooperating witness who changed his story when it suited his needs. Prosecutors made sure that this cooperator would testify only one way on the stand by cutting a deal with the cooperator: the cooperator would testify consistently with certain post-arrest statements and pre-plea-agreement interviews he had given to police and prosecutors and, in exchange, the State would agree to vacate one of his murder convictions and to recommend a significant reduction in his sentence for another. As a result of this consistency provision, the cooperator testified as directed and Petitioner was convicted – despite the fact that the cooperator's testimony was the State's only direct piece of evidence, and despite the fact that Petitioner presented *four* alibi witnesses who each testified that Petitioner was at his mother's house when the crime occurred.

As the trial judge stated on the record after the first trial (and before the cooperator offered his testimony in the next trial): "this is a difficult situation for me because it's one of the few times in 20 years I ever disagreed with a jury's verdict on a particular defendant . . . . [H]ad it been a bench trial I would have found Mr. Bannister not guilty, given the identification and his alibi." Pet. App. 47a.

For Petitioner's second trial, prosecutors had to seek out the cooperator despite his prior vacillating statements (and refusal to testify at Petitioner's first trial). Prosecutors secured the cooperator's testimony against Petitioner by inserting a consistency provision in the plea agreement and cutting a deal. The cooperator's testimony provided prosecutors with the only direct evidence against Petitioner in the second trial. Thus, the Court's consideration of the legitimacy of this type of provision will have a dispositive effect on Petitioner's challenge of his conviction.

* * *

In sum, *amici curiae* the Innocence Network and the Innocence Project support James Bannister's petition for certiorari. The issue presented is one of national importance, as a large number of criminal defendants are convicted on the basis of cooperator testimony, all across the country. Wrongful convictions involving incentivized testimony have been documented in 17 of 38 states studied and one study of death row inmates who were later exonerated found that 39.2% of the cases examined involved cooperator or snitch testimony. John T Rago, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform from the Pennsyl-*

vania Eight, 12 Widener L. Rev. 359, 439-40 (2006). Consistency provisions only increase the inherent unreliability of incentivized testimony, by removing important rights from defendants at trial such that Due Process is violated. Certiorari is necessary to prevent the inconsistent application of these Constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ James L. Brochin

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APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Association in Defence of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Brandeis Innocence Project (Schuster Institute for Investigative Journalism at Brandeis University), Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto

Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.